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# **NONCONSENSUAL SEX CRIMES AND THE UCMJ: A PROPOSAL FOR REFORM**

A Thesis Presented to The Judge Advocate General's School  
United States Army in partial satisfaction of the requirements  
for the Degree of Master of Laws (LL.M.) in Military Law

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, the Department of Defense, or any other governmental agency.

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APRIL 2003

## **NONCONSENSUAL SEX CRIMES AND THE UCMJ: A PROPOSAL FOR REFORM**

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*In the absence of a reform of Article 120, UCMJ, we are left to the unguided ad hoc application of the trial court's classification of "degrees" of rape, as reflected in the sentence adjudged ... [W]e are attempting to apply a 1950s law to the post – "sexual revolution" morality [or lack of it].*<sup>1</sup>

## I. Introduction

With the exception of one minor change,<sup>2</sup> the rape statute used by the military services in the twenty-first century is almost identical to the various common law statutes used to prosecute military members during the American Revolutionary War.<sup>3</sup> The common law definition of rape was the unlawful carnal knowledge of a woman forcibly and against her will or consent.<sup>4</sup> Today, Article 120(a) Uniform Code of Military Justice (UCMJ), reads, "Any person subject to this chapter who commits an act of sexual intercourse by force and

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<sup>1</sup> United States v. Webster, 37 M.J. 670, 675 n.8 (C.G.C.M.R. 1993).

<sup>2</sup> In 1992, Congress made the language of the military rape statute gender neutral and eliminated the spousal exemption. Congress made rape gender neutral to protect both male and female victims and eliminated the spousal exemption which held that a man could never be guilty of raping his wife because sex was an integral part of the marriage contract). National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 STAT. 2315, 2506 (1992)

<sup>3</sup> Major Martin Sims, "Coercive Sexual Intercourse": A Proposal to Amend Article 120, UCMJ, to Prevent the Misapplication of the "Parental Duress" Theory of the "Constructive Force" Doctrine of Rape (1999) (unpublished LL.M. thesis, The Judge Advocate General's School, U.S. Army) (on file with The Judge Advocate General's School Library).

<sup>4</sup> *In re Lane*, 135 U.S. 443 (1890).

without consent, is guilty of rape.”<sup>5</sup> The only difference between the common law definition and the current statute is that under the UCMJ, rape is gender neutral.

While the definition of rape in the military remains virtually unchanged, the military has experienced significant changes. One of the most important changes is the increased number of women serving throughout the armed forces. Prior to 1967, federal law limited the percentage of women in the military to two-percent of the total force.<sup>6</sup> After Congress eliminated the two-percent ceiling, the number of women increased to approximately fifteen percent.<sup>7</sup> The increase in the number of women in the Armed Forces results in men and women working together in the unique military environment. The analysis of the Military Rules of Evidence states, “Military life requires that large numbers of young men and women live and work together in close quarters that are often highly isolated. The deterrence of sexual offenses in such circumstances is critical to military efficiency.”<sup>8</sup>

In contrast to the military, the law of rape in civilian jurisdictions went through significant changes. In the 1960s, a reform movement began in the United States to change

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<sup>5</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 45 (2002) [hereinafter MCM]. The elements of rape under Article 120(a) are: (1) intercourse and (2) by force and without consent. *Id.*

<sup>6</sup> Public Law 90-30 removed the 2-percent cap on women in the military.

<sup>7</sup> *Active Duty Servicewomen by Branch of Service and Rank*, (citing U.S. Department of Defense, Defense Manpower Data Center unpublished data, March 30, 2001) at <http://www.inforplease.com/ipa/A0004600.html>.

<sup>8</sup> MCM, *supra* note 5, MIL. R. EVID. 412 analysis, app. 22, at A22-36.

rape laws.<sup>9</sup> This movement gained momentum throughout the 1970s.<sup>10</sup> All fifty states and the federal government enacted some sort of rape law reform by the 1980s.<sup>11</sup> These reforms expanded the definition of rape to include a wider range of abusive sexual assaults.<sup>12</sup> Federal and state governments divided the common law offense of rape into degrees of rape or sexual assault.<sup>13</sup> Differentiating between degrees of rape or sexual assault allowed governments to establish different maximum punishments based on the aggravating circumstances present in individual cases.<sup>14</sup> The reforms also led to changes in the rules of evidence and eliminated many of the “special rules” that applied to rape prosecutions.<sup>15</sup>

In *United States v. Webster*,<sup>16</sup> the United States Coast Guard Court of Military Review called for Congress to change Article 120, UCMJ.<sup>17</sup> The facts in *Webster* involved an allegation of date rape.<sup>18</sup> Machinery Technician Second Class (MK2)<sup>19</sup> Webster went to

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<sup>9</sup> CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT 17 (1992).

<sup>10</sup> *Id.* at 20.

<sup>11</sup> *Id.* at 17.

<sup>12</sup> *Id.* at 22.

<sup>13</sup> See *infra* notes 295-304 and accompanying text.

<sup>14</sup> *Id.*

<sup>15</sup> See *infra* notes 61 - 67 and accompanying text.

<sup>16</sup> 37 M.J. 670 (C.G.C.M.R. 1993).

<sup>17</sup> *Id.* at 675.

<sup>18</sup> See *infra* note 27.

<sup>19</sup> The fifth enlisted rank (E-5).



Petty Officer<sup>20</sup> T's apartment.<sup>21</sup> They held hands and kissed. Machinery Technician Second Class Webster requested that they go into the bedroom. Petty Officer T denied the request and MK2 Webster pulled her to the floor.<sup>22</sup> Petty Officer T asked MK2 Webster to leave. He started to leave. Then he grabbed Petty Officer T and backed her up against the kitchen counter. Petty Officer T told him "no" approximately five more times. Machinery Technician Second Class Webster did not listen to her requests and had sexual intercourse with her.<sup>23</sup>

In *Webster*, the court highlighted a number of the deficiencies with Article 120. The court stated that Article 120, the Manual for Courts-Martial<sup>24</sup>, (MCM) and the relevant case law fails to clearly define the crucial concepts of force and consent.<sup>25</sup> Combining consent and force in the element of "by force and without consent" leads to confusion. The *Webster* court wrote that the current guidance on the elements of rape is less than lucid.<sup>26</sup>

The *Webster* court next addressed the issue of date rape and acquaintance rape. The court discussed date rape and acquaintance rape at length to "illuminate this troubling area," which

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<sup>20</sup> The fourth enlisted rank (E-4).

<sup>21</sup> *Webster*, 37 M.J. at 672.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *See supra* note 5.

<sup>25</sup> *See infra* notes 248 - 249 and accompanying text.

<sup>26</sup> *Id.* at 683.

caused many states to correctly change their rape statutes.<sup>27</sup> The court concluded that applying Article 120, UCMJ, to nontraditional rape cases,<sup>28</sup> such as date rape or acquaintance rape, is difficult. The court then recommended that Congress change Article 120 to reflect the modern realities of rape.<sup>29</sup> The difficulty exists because common-law based rape statutes such as Article 120(a), UCMJ, define rape in terms of a “traditional rape” case. In a “traditional rape” case, a stranger stalks his victim, attacks and overpowers her, then has nonconsensual sexual intercourse with her.<sup>30</sup>

Most rapes cases actually involve an accused and victim who know each.<sup>31</sup> Often the parties are on a date or have had a dating or sexual relationship in the past.<sup>32</sup> The amount of force used does not rise to the level of violence typically associated with a “traditional rape” scenario. Many times the victim is not physically harmed.<sup>33</sup> In these situations, application

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<sup>27</sup> Date rape is generally rape committed by a person with whom the victim has had some romantic attachment or actually is on a date. *See* Key v. State, 765 S.W.2d 848 (TEX. CT. APP. 1989). Acquaintance rape is a more general term and is applied to rape committed by a person who is known to the victim to such an extent that the victim probably would not anticipate the criminal conduct. *See* Dolchok v. State, 763 P.2d 977 (AK. CT. APP. 1988). *Id.* at 674.

<sup>28</sup> *See* Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986). Ms. Estrich identifies two types of rape “traditional” rape (a violent rape committed by a stranger) and “nontraditional” rape (a less violent rape committed by an acquaintance of the victim). *Id.* at 1092.

<sup>29</sup> *Webster*, 37 M.J. at 674.

<sup>30</sup> Estrich, *supra* note 28 at 1092.

<sup>31</sup> Leonore M.J. Simon, *THERAPEUTIC JURISPRUDENCE: Sex Offender Legislation and the Antitherapeutic Effects on Victims*, 41 ARIZ. L. REV. 485, 496-97 (1999) (eighty-two percent of all sexual assaults committed against women age twelve and older are committed by someone they know).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

of Article 120(a) is difficult because of the requirement that intercourse occur by force and without consent.

In *Webster*, the court also called for Congress or the President to change Article 120(a), UCMJ, into a comprehensive article that divides the offense of rape into different degrees of criminal conduct based on the aggravating factors present in each case.<sup>34</sup> In his concurring opinion, Judge Bridgeman describes the problem of lumping all cases on nonconsensual intercourse together as rape. “The statute provides no degrees of rape. . .distinguished by the degree of force involved or other aggravating factors. Yet, in practice, rape has innumerable permutations.”<sup>35</sup> The convening authority referred Webster’s court-martial to a special court-martial, the equivalent of a misdemeanor in the civilian justice system. Judge Bridgeman expressed concern about the referral of a potentially capital offense to a special court martial.<sup>36</sup>

The case was treated as non-capital, and despite the presence of other serious charges, was referred to a special court-martial. Thus, the members were instructed that the maximum punishment they could adjudge was limited to a bad conduct discharge (BCD) and confinement for six months. The members, having found the act of intercourse was by force and without consent, awarded a sentence that included a BCD and confinement for only two months. This strongly suggests that, in the minds of both the convening

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<sup>34</sup> *Webster*, 37 M.J. at 674 n.8.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 683.

authority and the court members, there are degrees of rape. What those degrees are is anybody's guess.<sup>37</sup>

Judge Baum dissented in *Webster*, because he felt the actions of the accused did rise to the level of rape as defined in Article 120(a).<sup>38</sup> Judge Baum recognized that the concepts of date rape and acquaintance rape caused changes to the rape laws in many civilian jurisdictions, but the changes had not yet occurred in the military. Judge Baum wrote that Congress could modify the UCMJ to provide different degrees of sexual offenses, but until they do rape is a capital offense that should be treated as seriously as first-degree murder.<sup>39</sup> Based on the facts, Judge Baum did not believe Webster committed rape.

The majority and dissenting opinions in *Webster* highlight many of the major problems with the law of rape in the military justice system. First, the UCMJ, MCM and case law fail to clearly define crucial concepts such as force and consent. Second, Article 120(a), UCMJ, is an outdated statute that fails to adequately address the modern realities of rape. Third, lumping all rapes together as potential capital offenses fails to recognize that rape involves innumerable permutations.

The Coast Guard Court of Criminal Appeals is not the only source recommending a change to Article 120. In May 2001, the National Institute of Military Justice, a private non-

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<sup>37</sup> *Id.*

<sup>38</sup> *Webster* 37 M.J. at 684-85.

<sup>39</sup> *Id.*

profit organization, sponsored and prepared a report for the Commission on the 50<sup>th</sup> Anniversary of the Uniform Code of Military Justice.<sup>40</sup> Walter T. Cox III, Senior Judge of the Court of Appeals for the Armed Forces, chaired the Commission. The Commission made four recommended changes to the military justice system, including replacing Article 120, with a comprehensive criminal sexual misconduct statute.<sup>41</sup>

The Army Court of Criminal Appeals has also expressed concern regarding Article 120(a). In *United States v. Simpson*,<sup>42</sup> the court wrestled with the issue of what to do with cases involving coercive sex between recruits and drill sergeants. Drill sergeant and trainee cases are similar to date rape cases because the perpetrator does not use physical force or threats of imminent death or great bodily harm. Judge Brown wrote a concurring opinion highlighting how he analyzes drill sergeant trainee cases. He noted that young women and men who join the Army are not children of tender years, but they are put in an environment where they are conditioned to obey and not question authority.<sup>43</sup> “Given the all encompassing dominion and control of drill sergeants over trainees, military judges, court-martial panels, and appellate courts should be able to consider such factors — similar to

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<sup>40</sup> Report of the Cox Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001). The Commission Executive Summary can be located at the website of the National Institute of Military Justice found at [www.nimj.org](http://www.nimj.org) (last accessed 9 Apr. 03).

<sup>41</sup> *Id.*

<sup>42</sup> 55 M.J. 674 (Army Ct. Crim. App. 2002).

<sup>43</sup> *Id.* at 710-11.

those instructed on in parental rape cases — when deliberating on or reviewing findings in drill sergeant-trainee rape cases.”<sup>44</sup>

Judge Brown then addressed the issue of reform “Until and unless Congress (or the President in the case of Article 134, UCMJ) decides to overhaul the Uniform Code of Military Justice and the Manual for Courts-Martial's current sexual crime scheme, that is the approach that the [Court of Appeals for the Armed Forces] should take.”<sup>45</sup> Judge Brown’s dissenting opinion illustrates two of the problems with Article 120, as currently written. First, the statute is outdated and fails to reflect the modern realities of rape. Second, the UCMJ and the MCM fail to clearly define prohibited conduct especially in cases involving little physical violence.<sup>46</sup>

Article 120(a), UCMJ, is an outdated statute in need of modification. The article fails to clearly define crucial terms, fails to clearly define prohibited conduct, and fails to differentiate between degrees of rape based on the presence or absence of aggravating factors. This thesis proposes replacing Article 120, UCMJ, with a comprehensive criminal sexual misconduct statute. The proposed statute divides criminal nonconsensual sex offenses into different degrees of criminal sexual misconduct based on the aggravating circumstances

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> See *infra* notes 238 – 46 and accompanying text.

present in each case. This thesis also proposes new definitions for the legal concepts of force and consent to eliminate the confusion associated with the current definitions.

The thesis is divided into nine sections and one appendix. Section II provides a brief history of the development of the law of rape in civilian jurisdictions to illustrate how the law has evolved in the civilian community. Section III provides a history of the law of rape in the military to illustrate how the law of rape has evolved in the military courts. Section IV analyzes the status of the law of rape in the military today for comparison to the modern trends in the law of rape in civilian jurisdictions. Section V analyzes the need for reform of Article 120(a), UCMJ. Section VI includes an evaluation of the definitions of force and consent with proposed changes. Section VII proposes the division of the offense of rape into three degrees of criminal sexual misconduct based on the presence or absence of aggravating circumstances. Section VIII restructures the maximum punishments for the offense of criminal sexual misconduct in the first, second or third degree. Section IX concludes the article. The Appendix contains the proposed UCMJ article and amendments to the Manual for Courts-Martial (MCM).

## II. The History of the Criminal Offense of Rape in Civilian Jurisdictions

The history of the law of rape in American jurisdictions can be broken into two time periods. The common law period that starts in the 1700s and ends in the 1970s. The reform period begins in the 1970s and extends to the present.

## A. The Common Law Period

The law of rape in America, as in all English-speaking countries, developed as part of the English common law in the early seventeenth century.<sup>47</sup> In the 1600s, the prevailing view was that a woman was the property of her father until marriage, and then she became the property of her husband.<sup>48</sup> The common law of rape developed to protect the property rights of men in their wives and daughters.<sup>49</sup>

Sir Matthew Hale, the highly respected Chief Justice of the Court of the King's Bench from 1671 to 1675, recorded the English common law in scholarly treatises.<sup>50</sup> In Sir Hale's treatise, *The History of the Pleas of the Crown*,<sup>51</sup> he wrote extensively on the English common law. Sir Hale's writings greatly influenced American law in a number of different areas, including the law of rape.<sup>52</sup>

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<sup>47</sup> Beverly J. Ross, *Does Diversity In Legal Scholarship Make a Difference?: A Look At the Law of Rape*, 100 DICK. L. REV. 795, 803 (1996).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> EDMUND HEWARD, MATTHEW HALE (1972) (stating that Matthew Hale was one of the outstanding judges of the seventeenth century, a lawyer of great learning and a fearless judge who resisted all pressures put on him and could not be solicited by bribes or any other inducements; Hale's legal influence does not lie in his judgments but in his statements of the existing law contained in books such as, *The History of the Pleas of the Crown*).

<sup>51</sup> SIR MATTHEW HALE, HISTORIA PLACITORUM CORONAE [THE HISTORY OF THE PLEAS OF THE CROWN] 627 (2d ed. 1847).

<sup>52</sup> See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 330, (2001) (misdemeanor arrest authority); *Wilson v. Arkansas*, 514 U.S. 927, 932 (1995) (knock and announce rule); *United States v. Watson*, 423 U.S. 411, 429



In *The History of the Pleas of the Crown*, Sir Hale defined rape as the unlawful carnal knowledge of a woman against her will.<sup>53</sup> American jurisdictions generally adopted Sir Hale's definition of rape.<sup>54</sup> However, many American jurisdictions also added that the rape must be forceful to prove that the act was against the victim's will.<sup>55</sup> This addition led to the American common law definition of rape mentioned earlier — the unlawful carnal knowledge of a woman forcibly and against her will.<sup>56</sup>

Sir Hale's writings not only influenced the definition of rape, but they also influenced most of the rules governing the criminal prosecution of rape allegations in American jurisdictions.<sup>57</sup> Sir Hale wrote that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."<sup>58</sup> Because Sir Hale believed that a rape case was easy to allege but difficult to defend he viewed rape allegations with a certain amount of distrust and he held the victim-witness to a high standard of credibility.<sup>59</sup> Sir Hale distinguished between women of "good fame" and those who were

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(magistrates may rely on the information supplied by others when making a probable cause determination); *Reid v. Covert*, 354 U.S. 1, 26, (martial law).

<sup>53</sup> HALE, *supra* note 51 at 627.

<sup>54</sup> *In re M.T.S.*, 129 N.J. 422, 431-32 (N.J. 1992) (citing Cynthia A. Wicktom, *Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399 (1988)).

<sup>55</sup> *Id.*

<sup>56</sup> *In re Lane*, 135 U.S. 443 (1890).

<sup>57</sup> Ross, *supra* note 47, at 803.

<sup>58</sup> HALE, *supra* note 51, at 633-34.

<sup>59</sup> *Id.* Sir Hale's belief is based on his personal experience. He tells the story of two rape trials he presided over in which false accusations were made against innocent men who were almost put to death. In one of the cases

not of “chaste” character. Sir Hale considered a woman who reported the rape right away as more credible than a woman who waited to report the offense. Sir Hale expected a woman to fight, resist and call for help at the risk of physical injury to bolster her credibility.<sup>60</sup>

As a result of Sir Hale’s influence, American jurisdictions imposed at least five “special rules” on rape prosecutions in the United States that did not exist in any other area of criminal law.<sup>61</sup> These “special rules” distinguished rape from the treatment of other crimes because they focused on the conduct of the victim rather than the conduct of the accused.<sup>62</sup> For example, some jurisdictions required the victim to resist to the utmost to establish that she did not consent.<sup>63</sup> State laws required independent corroboration of the victim’s testimony, such as injuries consistent with resistance.<sup>64</sup> Other jurisdictions imposed prompt complaint requirements in rape cases that required the rape victim to complain right away to establish credibility.<sup>65</sup> Many American jurisdictions, including the military, gave cautionary instructions to the finder of fact highlighting that rape was easy to allege and difficult to

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the defendant was able to demonstrate that due to a physical deformity it was impossible for him to have intercourse. In the other case, the defendant was convicted of rape; however, before sentencing it was discovered that his accusers lied. *Id.* at 634-35

<sup>60</sup> *Id.* at 633.

<sup>61</sup> The five “special rules” were: (1) The prompt complaint rule; (2) The corroboration requirement; (3) The resistance requirement; (4) Rules of evidence that allowed inquiry into a victim’s past sexual history; (5) Cautionary instructions. Ross, *supra* note 47, at 844 - 57.

<sup>62</sup> *In re M.T.S.*, 129 N.J. 422, 435-36 (N.J. 1992).

<sup>63</sup> See, e.g., *Starr v. State*, 237 N.W. 96, 97 (1931); *Reidhead v. State*, 72, 250 P. 366, 367 (1926); *Brown v. Wisconsin* 106 N.W. 536, 538 (1906)

<sup>64</sup> See, e.g., *Texter v. Nebraska*, 102 N.W.2d 655 (1960); *People v. Radunovic*, 234 N.E.2d 452 (1959).

defend.<sup>66</sup> The rules of evidence permitted inquiry into a victim's past sexual behavior as probative of the element of consent and as character evidence.<sup>67</sup> Most of these "special rules" existed in American jurisdictions from the 1700s until the 1970s.

## B. The Reform of Rape Laws In American Jurisdictions

The common law definition of rape and the "special rules" associated with rape cases came under attack in the 1960s and 1970s.<sup>68</sup> Feminists, social scientists and legal scholars criticized the common law definition of rape.<sup>69</sup> These reformers argued that rape was not a crime about sex but rather a crime of violence that should be treated like other crimes of violence.<sup>70</sup> The rape laws treated rape as a sex crime because the laws were designed to protect the property rights of men in their wives and daughters and not protect females from attack.<sup>71</sup> The reformers also attacked the "special rules" used in rape prosecutions. The corroboration requirements and cautionary instructions wrongly stereotyped rape victims as

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<sup>65</sup> *Washington v. Murley*, 212 P.2d 801 (1949); *see generally* MODEL PENAL CODE § 213.6 cmt. at 423 (bars prosecution unless the victim notifies authorities within three months of the rape).

<sup>66</sup> *See United States v. Steward*, 18 M.J. 506 (A.F.C.M.R. 1984); (1980); *People v. Nye*, 237 P.2d 4 (Cal. 1951).

<sup>67</sup> Cynthia Ann Wictom, *Note: Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399, 405-06.

<sup>68</sup> SPOHN & HORNEY *supra* note 9, at 20.

<sup>69</sup> *Id.* at 22.

<sup>70</sup> Wictom, *supra* note 67, at 400.

<sup>71</sup> *In re M.T.S.*, 129 N.J. 422, 437 (N.J.1992) (citing SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 377 (1975)).

inherently less trustworthy than other victims of criminal attack.<sup>72</sup> The distrust of the victim inherent in the rape laws put the victim's credibility on trial rather than the accused.<sup>73</sup>

The rules of evidence that allowed the victim's sexual history admitted into trial came under attack as well because this evidence was only admissible in rape cases.<sup>74</sup> Reformers argued that this evidence was of minimal probative value and was greatly outweighed by the damage it did to the victims of rape. The rules of evidence often put the victim through a humiliating experience that discouraged other women from reporting sexual assaults because they did not want to go through a trial in which their sex life would be admitted before the jury.<sup>75</sup>

The efforts to reform American rape statutes based on the common law were very successful. All American jurisdictions enacted some sort of rape reform by the 1980s.<sup>76</sup> The reforms focused on five areas: the definition of rape, resistance requirements, the consent standard, corroboration requirements, cautionary instructions, and evidentiary reform.

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.* (citing Lucy Reid Harris, *Toward a Consent Standard*, 43 U. CHI. L. REV 613, 626 (1976)).

<sup>74</sup> SPOHN & HORNEY *supra* note 11, at 25-26.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 17.

### *1. Defining Rape*

Many American jurisdictions changed the definition of rape, to prohibit more types of abusive sexual conduct and provide protection to additional victims. For example, jurisdictions prohibited all forms of nonconsensual penetration by changing the definition of intercourse to include all types of penetration rather than just vaginal intercourse.<sup>77</sup> Legislatures eliminated the spousal exemption<sup>78</sup> to protect spouses and removed gender language from state statutes to protect males from sexual assaults.<sup>79</sup>

Several American jurisdictions eliminated their common law based rape statutes and enacted statutes that divided rape into categories or degrees of rape.<sup>80</sup> The division of rape into different degrees allowed American jurisdiction to differentiate the most egregious rape cases from the less egregious cases based on the presence or absence of aggravating factors in a particular case. State and federal legislatures then determined the appropriate maximum punishment level for each degree of rape. Jurisdictions differentiated between the different degrees of rape based on a number of different factors: the amount of force used, the

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<sup>77</sup> Stacy Futter & Walter R. Mebane, Jr., *The Effects of Rape Law Reform on Rape Case Processing*, 16 BERKELEY WOMEN'S L. J. 72, 78 (2001).

<sup>78</sup> The spousal exemption can also be traced to the writing of Sir Matthew Hale as well. In *The History of the Pleas of the Crown*, Sir Hale states that a husband cannot rape his wife because of their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract. Before removal of the spousal exemption a husband could not be guilty of raping his wife. HALE, *supra* note 51, at 629.

<sup>79</sup> Futter & Mebane, *supra* note 77, at 78.

<sup>80</sup> See *infra* notes 295 - 306.

seriousness of the act, the extent of the injury inflicted on the victim and the age of the victim.<sup>81</sup>

Other jurisdictions eliminated the term "rape" from their penal codes completely and replaced rape statutes with statutes that defined a range of criminal conduct each classified as a different degree of sexual assault or criminal sexual conduct.<sup>82</sup> Once again, the different degrees of the criminal sexual offenses allowed the states and the federal government to define what type of sexual assaults were the most egregious and thus subject to the higher criminal penalty based on the aggravating factors in a particular case.

Prior to the reform of American rape statutes, rape generally carried a maximum penalty of execution<sup>83</sup> or life imprisonment.<sup>84</sup> Because of the severity of rape penalties, many juries refused to convict defendants for any rape other than those involving aggravated assault and serious injury.<sup>85</sup> Reformers advocated changing the penalty structure to increase juries

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<sup>81</sup> *Id.*

<sup>82</sup> See *infra* notes 301 - 304.

<sup>83</sup> Sir Hale's influence is also seen in the punishment authorized in rape trials. He wrote that rape is a most detestable crime and therefore ought to severely and impartially be punished by death. HALE, *supra* note 51, at 633-34.

<sup>84</sup> Ross, *supra* note 47, at 846.

<sup>85</sup> *Id.*

willingness to convict defendants in sexual assault cases. Consequently, many American jurisdictions eliminated the death penalty for rape.<sup>86</sup>

## *2. Resistance Requirements*

Reformers successfully argued that rape was not a crime about sex. Rape involved violence and warranted treatment equivalent to other crimes of violence.<sup>87</sup> Reformers also argued that requirements to resist to the utmost of one's ability only applied in rape cases and not in other assault type offenses.<sup>88</sup> For example, the law did not require a robbery victim to resist the forceful taking of their property to sustain a conviction. Yet, the victims of rape had to fight off their attacker to establish credibility. The resistance requirements put victims in a position in where they had to choose between resisting and putting their own safety at risk, or not resisting and putting their credibility at risk.<sup>89</sup> American jurisdictions generally eliminated the requirement for the victims of rape to resist to the utmost; however, evidence of resistance often was admissible concerning the issue of consent.<sup>90</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 819.

<sup>89</sup> *Id.*

<sup>90</sup> 18 PA. CODE § 3107 (1976); MONT. CODE ANN. § 45-5-511 (1973).

### 3. *The Consent Standard*

The rape statutes based on the common law that evolved in most American jurisdictions made nonconsent by the victim an essential element of the crime by including phrases such as “by force and against her will.”<sup>91</sup> Many jurisdictions required the victim to resist to the utmost of her ability to demonstrate nonconsent.<sup>92</sup> Other jurisdictions required that the victim demonstrate such earnest resistance as might reasonably be expected under the circumstances.<sup>93</sup> The reformers argued that defining consent in terms of the victim’s resistance put victims at risk of serious injury or death.<sup>94</sup> The without consent element of rape requiring victim resistance shifted the inquiry away from the acts of the defendant to an inquiry into the acts of the victim.<sup>95</sup>

In response to the criticisms to the consent standards, some American jurisdictions made changes to the consent standard. Some jurisdictions eliminated the requirement that the victim resist as proof of the victim’s lack of consent.<sup>96</sup> Other jurisdictions attempted to remove the ambiguity in the consent standard by defining circumstances when the finder of

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<sup>91</sup> SPOHN & HORNEY, *supra* note 11, at 23.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* (citing Texas Penal Code § 21.02 (1974)).

<sup>94</sup> *Id.* at 23.

<sup>95</sup> *Id.*

<sup>96</sup> *See, e.g.*, 18 PA. CODE § 3107 (1976); MONT. CODE ANN. § 45-5-511 (1973); SPOHN & HORNEY, *supra* note 11, at 23.



fact could presume nonconsent. For example, consent may be presumed if the accused used a weapon, if the victim is injured during the rape or if the rape occurs while the perpetrator is committing another criminal offense.<sup>97</sup>

#### 4. *Corroboration Requirements and Cautionary Instructions*

Reformers successfully argued that the corroboration requirements and cautionary instructions wrongly stereotyped rape victims as inherently less trustworthy than other victims of criminal attack.<sup>98</sup> This distrust of the victim put her credibility on trial rather than the accused.<sup>99</sup> The reformers further argued that the rape victim's testimony is as reliable as any other form of evidence and called for the elimination of the corroboration requirements and cautionary instructions.<sup>100</sup> State legislatures or judges responded to the reformer's arguments and eliminated corroboration requirements and cautionary instructions.<sup>101</sup>

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<sup>97</sup> SPOHN & HORNEY, *supra* note 11, at 23-24.

<sup>98</sup> *In re M.T.S.*, 129 N.J. 422, 437 (N.J. 1992) (citing *House Urges New Definition of Rape*, 61 A.B.A.J. 464 (1975)).

<sup>99</sup> *Id.* (citing Lucy Reid Harris, *Toward a Consent Standard*, 43 U. CHI. L. REV 613, 626 (1976)).

<sup>100</sup> Wicktom, *supra* note 67, at 399 n.78.

<sup>101</sup> See, e.g., MICH. COMP. LAWS § 750.520(h) (2002); *United States v. Sheppard*, 569 F.2d 114, 117 (D.C. Cir. 1977). See generally Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1137 n.155 (1986).

### 5. Evidentiary Reforms

The evidentiary rules in existence before the reform period of the 1970s allowed evidence into trial concerning the victim's sexual history. The belief that an unchaste woman was less credible than a more virtuous woman justified the admissibility of evidence of the victim's sexual history.<sup>102</sup> Rape reform advocates pointed out that this evidence was only admissible in rape cases and often put women through humiliating experiences.<sup>103</sup> These experiences discouraged other women from reporting rapes. Rape reform advocates successfully argued that the evidence of the victim's sexual history had only a tenuous connection to the offense being tried and served no real purpose other than to embarrass the victim.<sup>104</sup> By 1985, most American jurisdictions, including the federal system had enacted rape shield laws<sup>105</sup> that restricted the use of the victim's prior sexual history.

#### C. Continuing Reform - Abuse of a Position of Authority

The rape reform movement resulted in many changes including the way the federal and state government defined rape. Many states adopted penal statutes to deal with the problem of individuals violating a position of trust and authority to obtain sexual intercourse from

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<sup>102</sup> See *supra* notes 59 - 60 and accompanying text.

<sup>103</sup> SPOHN & HORNEY, *supra* note 11, at 25-26.

<sup>104</sup> Deborah Wood, *Applying MRE 412: Should It Be Used at Article 32 Hearings?*, ARMY LAW., July 1982, at 13.

<sup>105</sup> Ross, *supra* note 47, at 844. Rape shield laws limit the admissibility of evidence concerning the victim's sexual history. Futter & Mebane *supra* note 77, at 79.

individuals they have a duty to protect.<sup>106</sup> The abuse of authority laws prohibited intercourse based on the status of the perpetrator and the victim. For example, some states criminalized sexual relationships between parents and their children, doctors (especially psychotherapists) and their patients, students and teachers, and inmates and prison guards.<sup>107</sup>

### III. History of the Criminal Offense of Rape in the United States Military Justice System

The American military justice system, like the American civilian justice system, traces its roots back to Great Britain. Ironically, Colonial leaders embraced the British system of military justice at the outbreak of the Revolutionary War.<sup>108</sup> In early 1775, the Provisional Congress of Massachusetts Bay approved the first written American military code, the Massachusetts Articles of War. The Massachusetts Articles of War were based almost exclusively on the British Articles of War of 1774.<sup>109</sup>

#### A. American Revolutionary War to the American Civil War

Later in 1775, the Continental Congress approved sixty-nine Articles of War to govern the conduct of the Revolutionary Army.<sup>110</sup> George Washington headed the committee that

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<sup>106</sup> See *infra* notes 463, 469 - 74.

<sup>107</sup> *Id.*

<sup>108</sup> Captain David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129, 145-146 (1980).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

prepared the 1775 Articles of War.<sup>111</sup> The 1775 Articles of War did not specifically list rape as an offense, nor did they authorize a court-martial for a military member accused of rape. Instead, the Articles of War mandated that commanders turn over military members accused of rape, or any other civilian capital crime, to local civilian jurisdictions for prosecution and punishment in accordance with the laws of the local jurisdiction.<sup>112</sup> Congress made significant changes to the Articles of War in 1776, 1786 and 1806; however, the requirement to turn over military members accused of rape (and other civilian capital criminal offenses) to the civilian jurisdiction continued until 1863.<sup>113</sup>

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<sup>111</sup> U.S. DEP'T OF ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975, at 12-13 (1975).

<sup>112</sup> Section X, Article 1 of the Articles of War of 1776 provided that:

Whenever any officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offense against the persons or property of the good people of any of the United American States, such as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or party, to which the person or persons so accused shall belong, are hereby required, upon application duly made by or in behalf of the party or parties injured, to use his utmost endeavors to deliver over such accused person or persons to the civil magistrate; and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring them to trial. If any commanding officer or officers shall willfully neglect or shall refuse, upon application aforesaid, to deliver over such accused person or person to the civilian magistrates, or to be aiding or assisting to the officers of justice in apprehending such person or persons, the officer or officers so offending shall be cashiered.

American Articles of War (1776) *reprinted in* WILLIAM WINTHROP, MILITARY LAW & PRECEDENTS 964 (2d ed. 1920 reprint).

<sup>113</sup> WILLIAM WINTHROP, MILITARY LAW & PRECEDENTS, 972 (2d ed. 1920 reprint).

## B. The American Civil War to World War II

During the Civil War, Congress changed the rules concerning the prosecution of rape and other capital offenses committed by military members because of the unique aspects of the war. American forces occupied Confederate states without functioning civil court systems. The lack of functioning civilian courts and the prohibition against the use of courts-martial for civilian capital offenses meant that occupied territories did not have a forum to prosecute soldiers accused of rape and other civilian capital offenses.<sup>114</sup>

In 1863, Congress fixed this problem when it passed legislation entitled an “Act for Enrolling and Calling Out the National Forces and for Other Purposes” (National Forces Act of 1863).<sup>115</sup> The act gave the military exclusive jurisdiction over military members accused of rape (and other civilian capital offenses) in time of war, insurrection or rebellion. Congress’s grant of exclusive authority to court-martial military members for violent crimes including rape during times of war, insurrection or rebellion changed the role of the military in prosecuting rape offenses. After 1863, commanders became responsible for referring rape allegations made against military members to courts-martial.<sup>116</sup>

While the National Forces Act of 1863 gave the military authority to court-martial military members accused of the rape, the act did not define rape, nor was rape defined by

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<sup>114</sup> *Id.* at 667.

<sup>115</sup> 12 Stat. 736 (1863).

any of the other statutes governing the military.<sup>117</sup> The military adopted the common law definition of rape prevalent in most American jurisdiction at the time,<sup>118</sup> the unlawful carnal knowledge of a woman forcibly and against her will or consent.<sup>119</sup>

The state of Tennessee challenged the military's exclusive jurisdiction over military members in the case of *Coleman v. Tennessee*.<sup>120</sup> In *Coleman*, the Supreme Court upheld the military's exclusive authority to court-martial military members.<sup>121</sup> Coleman was a soldier accused of and convicted of a murder at a court-martial. At the time of the murder, Coleman was part of the United States military occupying Tennessee. The court-martial sentenced Coleman to death, but the sentence was never carried out. After the Civil War, the state of Tennessee charged and convicted Coleman for the same murder and sentenced him to death. In overturning the conviction, the Supreme Court held that the military had exclusive jurisdiction over serious civilian offenses committed by military members while in occupied territories because of the National Forces Act of 1863.<sup>122</sup>

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<sup>116</sup> WINTHROP, *supra* note 113, at 667.

<sup>117</sup> *Id.* at 671.

<sup>118</sup> *Id.* at 677.

<sup>119</sup> *Id.*

<sup>120</sup> 97 U.S. 509 (1878).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

The passage of the National Forces Act of 1863 and the Supreme Court's decision in *Coleman* represented the beginning of a shift in the role of the military justice system. The act increased a military commander's ability to enforce discipline because he could now exercise jurisdiction over offenses previously reserved to civilian authorities. In 1874, Congress amended the Articles of War to include this increased court-martial jurisdiction over rape and other serious offenses during time of war, insurrection or rebellion.<sup>123</sup>

Congress changed the Articles of War again in 1916 and 1920 but the changes did not significantly affect the substantive law regarding rape. The 1916 changes expanded the military's court-martial jurisdiction to include all common law felonies (e.g. manslaughter, mayhem, robbery, larceny and arson), except rape and murder committed in the United States during peacetime.<sup>124</sup> Rape and murder allegations still required the military to turn over service members to local jurisdictions for prosecution, unless offenses occurred outside the United States or during a time of war, insurrection or rebellion.<sup>125</sup>

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<sup>123</sup> 18 Stat. 228 (1874).

Article 58. - In the time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by a person in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offense, by the laws of the State, Territory, or District in which such offence may have been committed.

*Id.*

<sup>124</sup> *Loving v. United States*, 517 U.S. 748, 753 (1996) (citing 39 Stat. 664 (1916)).

<sup>125</sup> 39 Stat. 619, 664 (1916).

### C. The Adoption of the Uniform Code of Military Justice to Today

The adoption of the UCMJ in 1950<sup>126</sup> was the most far-reaching change in military law in United States history. The UCMJ provided, for the first time, one criminal code applicable to all services.<sup>127</sup> The UCMJ provided jurisdiction over all offenses committed by military members. Commanders could now bring rape charges against military members regardless of where the offenses occurred or whether the United States was in a time of war, insurrection, rebellion.<sup>128</sup>

The UCMJ combined the offenses of rape and carnal knowledge<sup>129</sup> in Article 120.<sup>130</sup> The rape prohibition in Article 120(a), retained the common law definition of rape, which prohibited a male from engaging in, “an act of sexual intercourse with a female not his wife,

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Article 92. Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may be direct; but no person shall be tried by court martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in times of peace.

*Id.*

<sup>126</sup> 64 Stat. 108 (1950).

<sup>127</sup> THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975 at 203 (1976).

<sup>128</sup> Winthrop, *supra* note 113, at 667.

<sup>129</sup> The Articles of War did not contain a specific article prohibiting carnal knowledge. Prosecutors used the general article, incorporating the carnal knowledge or statutory rape statute of the jurisdiction in which the offense occurred to court-martial military members who engaged in sexual intercourse with women under the legal age of consent. When the UCMJ replaced the Articles of War, Congress specifically prohibited carnal knowledge by adopting Article 120(b), UCMJ. United States v. Osborne, 31 M.J. 842 (N.M.C.M.R. 1990).

<sup>130</sup> 64 Stat. 108 (1950).



by force and without her consent.”<sup>131</sup> The military courts also retained many of the common law “special rules” for rape cases, including corroboration requirements,<sup>132</sup> the fresh complaint rule,<sup>133</sup> and evidentiary rules that allowed inquiry into the victim’s sexual history.<sup>134</sup>

The “special rule” requiring the victim’s allegation to be corroborated in rape cases applied in military courts-martial until 1980.<sup>135</sup> Prior to 1980, the evidentiary rules applicable to courts-martial required corroboration of the victim’s testimony only in sex offense cases.<sup>136</sup> The 1969 Manual allowed the defense to request that the military judge instruct the court-martial panel that a conviction cannot be based upon the uncorroborated testimony given by an alleged victim if the testimony was “self-contradictory, uncertain, or improbable.”<sup>137</sup>

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<sup>131</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. XXVIII, ¶ 199(a) (1951) [hereinafter 1951 MCM].

<sup>132</sup> 1951 MCM pt. XXVII, ¶ 153a. “A conviction cannot be based upon the uncorroborated testimony of an alleged victim in a trial for a sexual offense ... if such testimony is self-contradictory, uncertain, or improbable.” *Id.*

<sup>133</sup> 1951 MCM pt. XXVII, ¶ 142c. “In prosecutions for sexual offenses ... evidence that the alleged victim of such an offense made complaint thereof within a short time thereafter is admissible.” *Id.*

<sup>134</sup> 1951 MCM pt. XXVII, ¶ 153b. “For the purpose of impeaching the credibility of the alleged victim, evidence the victim has an unchaste character is admissible.” *Id.*

<sup>135</sup> *United States v. Sandoval* 18 M.J. 55, 61 (C.M.A. 1984).

<sup>136</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. XXVII ¶ 153a (1969) [hereinafter 1969 MCM]; 1951 MCM pt. XXVII, ¶ 153a.

<sup>137</sup> 1969 MCM *supra* note 136, pt. XXVII ¶ 153a; 1951 MCM *supra* note 131, pt. XVII ¶ 153a.

One of the ways of corroborating or discrediting the victim's allegations was the fresh complaint rule. The 1969 MCM provided that "evidence that the alleged victim failed to make a complaint of the offense within a reasonable time after its commission is admissible."<sup>138</sup> Military courts also allowed evidence of the victim's sexual history admitted into evidence. The rules of evidence in the 1951 MCM authorized the impeachment of a witness's "unchaste character."<sup>139</sup> This evidence was admissible whether or not the witness testified.<sup>140</sup>

In 1980, President Carter signed Executive Order 12198 promulgating the Military Rules of Evidence (MREs). The MREs paralleled the Federal Rules of Evidence.<sup>141</sup> The MREs completely replaced the prior evidentiary rules and drastically altered the types of admissible evidence at a court-martial of an accused charged with committing a nonconsensual sexual offense. The new MREs eliminated the corroboration requirement, the fresh complaint rule and included a rape shield provision in MRE 412.<sup>142</sup> Military Rule of Evidence 412

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<sup>138</sup> 1969 MCM *supra* note 136, pt. XXVII ¶ 142c.

<sup>139</sup> 1951 MCM *supra* note 131, pt. XXVII ¶ 153b.

<sup>140</sup> *Id.*

<sup>141</sup> Wood, *supra* note 104, at 13.

<sup>142</sup> *Id.*

precluded all reputation or opinion evidence of the victim's prior sexual activity<sup>143</sup> and other evidence of the victims sexual past except in three limited circumstances.<sup>144</sup>

In 1992, Congress modified Article 120(a),<sup>145</sup> to make the offense of rape gender neutral<sup>146</sup> and removed the spousal exception.<sup>147</sup> Article 120(a) now reads, "Any person subject to this chapter who commits an act of sexual intercourse by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct."<sup>148</sup> This definition of rape remains almost identical to the common law definition of the unlawful carnal knowledge of a woman forcibly and against her will or consent. As evidenced by the history of the law of rape in the military there have been a few significant changes. The most significant changes occurred in the areas of jurisdiction and the evidentiary rules.

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<sup>143</sup> *Id.*

<sup>144</sup> The three limited circumstances are: (1) when the evidence is introduced to show a person other than the accused was the source of semen, injury or other physical evidence; (2) Prior sexual behavior with the accused; (3) Constitutionally required evidence. MCM *supra* note 5, MIL. R. EVID. 412.

<sup>145</sup> National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 STAT. 2315, 2506 (1992).

<sup>146</sup> Congress struck the language "with a female" to make the offense applicable to both female and male victims. *Id.*

<sup>147</sup> Under the spousal exemption, men could not be charged for raping their wives because sex was an integral part of the marriage contract. The law did not recognize the crime as a personal violation. *See supra* note 78.

<sup>148</sup> MCM, *supra* note 5, pt. IV, ¶ 45a.

#### IV. The Current Law of Rape in the United States Military

In *United States v. Simpson*,<sup>149</sup> the Army Court of Criminal Appeals wrote that,

Despite its often vile nature and profound consequences, rape is a deceptively simple crime, with only two elements: (1) an act of sexual intercourse; (2) done by force and without the consent of the victim... Practically speaking, however, rape is often a complex offense because of the interrelationships among the legal concepts of force, resistance, consent, and mistake of fact.<sup>150</sup>

##### A. An Act of Sexual Intercourse

The first element required by Article 120(a) is an act of sexual intercourse. The MCM defines sexual intercourse as any penetration, however slight of the female sex organ by the penis.<sup>151</sup> Ejaculation is not required. The *Military Judge's Benchbook (Benchbook)*<sup>152</sup> defines the female sex organ as "including the vagina which is the canal that connects the uterus to the external opening of the genital canal, and the external genital organs including the labia majora and labia minora."<sup>153</sup>

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<sup>149</sup> *United States v. Simpson*, 55 M.J. 674 (Army Ct. Crim App. 2001).

<sup>150</sup> *Id.* at 695.

<sup>151</sup> MCM, *supra* note 5, pt. IV, ¶ 45a.

<sup>152</sup> U.S. DEP'T OF ARMY, PAM 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, 449 (1 APR. 2001) [hereinafter BENCHBOOK].

<sup>153</sup> *Id.* (forcible anal intercourse and forcible oral sex are not included in the definition of rape under Article 120; forcible anal sex and forcible oral sex are prosecuted under UCMJ Article 125).

## B. By Force and Without Consent

The MCM definition of “force and without consent”<sup>154</sup> distinguishes between two types of rape cases, constructive force cases and actual force cases. In *United States v. Kernan*,<sup>155</sup> Judge Anderson, in a dissenting opinion, wrote how he distinguished the two types of rape cases.

The crime of rape quite commonly follows one of two more or less typical factual patterns. The first is found in cases where an accused has carnal knowledge of a prosecutrix despite her vigorous physical resistance, which he overcomes by the application of superior physical force. Under these circumstances, lack of consent on the part of the prosecutrix is demonstrated by her resistance and that the accused employed force is manifest from the very nature of his acts. A second more or less typical factual pattern is found in cases where there is little or no resistance on the part of the prosecutrix but she submits because of conduct on the part of the accused calculated to put her in fear of death or great bodily harm. Here again, the act of intercourse will be rape. Resistance by the woman is only one method by which lack of consent is manifested and, if she submits through fear of death or great bodily

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<sup>154</sup> The MCM defines force and lack of consent as follows:

Force and lack of consent are necessary to the offense. The lack of consent required, however, is more than mere lack of acquiescence. If a woman in possession of her mental and physical faculties fails to make her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she did consent. Consent, however, may not be inferred if resistance would have been futile, where resistance is overcome by threats of death or great bodily harm, or where the female is unable to resist because of the lack of mental or physical faculties. In such a case there is no consent and the force involved in penetration will suffice. All the surrounding circumstances are to be considered in determining whether a woman gave her consent, or whether she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm. If there is actual consent, although obtained by fraud, the act is not rape, but if to the accused's knowledge the woman is of unsound mind or unconscious to an extent rendering her incapable of giving consent, the act is rape. Likewise, the acquiescence of a child of such tender years that she is incapable of understanding the nature of the act is not consent.

MCM, *supra* note 5, pt. IV, ¶ 45c(1)(b).

<sup>155</sup> 11 C.M.R. 314, 321 (C.M.A. 1954).

harm the mere fact that she failed to resist does not necessarily mean that she consented to the act of intercourse. And, whether regarded as constructive force or as one form of actual force, the threatening conduct of the accused and the act of intercourse effected by means of it without prosecutrix' consent is sufficient to constitute rape.<sup>156</sup>

The distinction between constructive force and actual force is important because the "by force and without consent" element of rape is defined differently depending upon whether the case is an actual force case or a constructive force case.

### *1. Constructive Force*<sup>157</sup>

The military courts apply constructive force in a variety of different circumstances.<sup>158</sup> In order to establish constructive force, the finder of fact must find that "resistance would have been futile," resistance was "overcome by threats of death or great bodily harm," or "the victim is unable to resist because of the lack of mental or physical faculties."<sup>159</sup> The finder of fact must evaluate all the surrounding circumstances to determine whether a victim gave

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<sup>156</sup> *Id.* at 321.

<sup>157</sup> Military courts have long recognized the concept of constructive force. Colonel Winthrop discussed the topic of force necessary to accomplish rape in 1886, "[I]t is not essential that the force employed consist in physical violence; it may be exerted in part or entirely by means of other forms of duress, or by threats of killing or of grievous bodily harm or other injury, or by any moral compulsion." In 1917, the Manual for Courts-Martial provided: "Force, actual or constructive, and a want of consent are indispensable in rape, but the force involved in the act of penetration is alone sufficient force where there is in fact no consent." *United States v. Clark*, 35 M.J. 432, 436 (C.M.A. 1992).

<sup>158</sup> The benchbook contains eight separate instructions addressing common scenarios involving potential force and consent issues. Of these eight scenarios, seven deal with constructive force: (1) intimidation and threats (2) abuse of military power (3) parental or analogous compulsion (4) child of tender years (5) parental or analogous compulsion and child of tender years (6) mental infirmity (7) incapable of consent due to sleep, unconsciousness or intoxication. BENCHBOOK, *supra* note 152, at 429-440.

consent or whether the victim failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm.<sup>160</sup> If the finder of fact determines constructive force is appropriate for a particular case then the “by force and without consent” element is satisfied upon proof of penetration.<sup>161</sup>

The doctrine of constructive force protects victims rendered incapable of giving consent due to physical or mental infirmities, such as unconsciousness<sup>162</sup> or severe mental retardation.<sup>163</sup> Constructive force may also apply in cases where the assailant uses express or implied threats of bodily harm.<sup>164</sup> For example, in *United States v. Hicks*,<sup>165</sup> Sergeant (SGT) Hicks found the girlfriend of one of his subordinates staying in the subordinate’s barracks room, in violation of local regulations. Sergeant Hicks threatened to put the victim’s boyfriend in confinement unless she gave into his sexual demands. The United States Court

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<sup>159</sup> *Clark*, 35 M.J. at 435; MCM, *supra* note 5, pt. IV, ¶ 45c(1)(b);

<sup>160</sup> *United States v. Hicks*, 24 M.J. 3, 6 (1987).

<sup>161</sup> MCM, *supra* note 5, pt. IV, ¶ 45c(1)(b).

<sup>162</sup> *See, e.g., United States v. Hughs*, 48 M.J. 214, (1998) (sleeping victim thought the accused was her boyfriend because she was asleep and the lights were out). *United States v. Grier*, 33 M.J. 7, 8 (C.M.A. 1991) (upheld a rape conviction when the victim passed out after consuming alcohol and the appellant engaged in sexual intercourse with her).

<sup>163</sup> *United States v. Pingree*, 39 M.J. 884, 885 (A.C.M.R. 1994).

<sup>164</sup> *United States v. Bradley*, 28 M.J. 197, 200 (C.M.A. 1989) (upheld the rape conviction of a drill sergeant who obtained sex from one of his trainee’s wife by threatening to put her husband in jail for three years unless she complied with his request for sexual favors).

<sup>165</sup> *Hicks*, 24 M.J. at 6.

of Military Appeals<sup>166</sup> (COMA) upheld SGT Hicks' conviction for rape because the threat constituted constructive force.

Through case law the military courts extend constructive force to cases of sexual intercourse between a parent and his or her child.<sup>167</sup> The courts find constructive force if the parent uses their position of authority over the child to coerce the child into intercourse.<sup>168</sup> In *United States v. Palmer*,<sup>169</sup> COMA held that the "moral, psychological, or intellectual force a parent exercises over a child" might rise to the level of constructive force. If the parental coercion rises to the level of constructive force then the child is not required to resist and the act of intercourse alone satisfies the element of by force and without consent. The military courts refused to adopt a per se rule that sex between a parent and child always constitutes rape.<sup>170</sup>

The military courts treat cases involving abuse of rank or duty position similar to parental coercion.<sup>171</sup> In *United States v. Clark*,<sup>172</sup> COMA upheld the conviction of a

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<sup>166</sup> See National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994) (renaming the United States Court of Military Appeals (C.M.A.) to the United States Court of Appeals for the Armed Forces (CAAF)).

<sup>167</sup> *United States v. Palmer* 33 M.J. 7 (C.M.A. 1991); *United States v. Ortiz*, 25 M.J. 840 (A.F.C.M.R. 1987); *United States v. Dejonge*, 16 M.J. 974 (A.F.C.M.R. 1983).

<sup>168</sup> *Id.*

<sup>169</sup> 33 M.J. 7, 8 (C.M.A. 1991).

<sup>170</sup> *United States v. Dunning* 40 M.J. 641, 646 (1994).

<sup>171</sup> See generally *United States v. Williamson*, 24 M.J. 32, 34 (C.M.A. 1987) ("Resistance is not required [for rape] . . . when it would be futile; the totality of the circumstances, including the level of resistance, are to be considered by the fact finders in determining whether consent was lacking."); *United States v. Hicks*, 24 M.J. 3,



noncommissioned officer (NCO) who engaged in sexual intercourse with a new enlistee under his supervision. Sergeant Clark ordered the victim to accompany him to a storage shed to get supplies. She complied with the order. While in the shed, SGT Clark grabbed her and had intercourse with her.<sup>173</sup> She did not actively resist because of she was scared. The court found her fear to be reasonable based on SGT Clark's rank, status, physical size and the location of the assault.<sup>174</sup> The court cited a number of other cases that held that the superior-subordinate relationship could be considered when deciding if constructive force existed.<sup>175</sup> However, the superior-subordinate relationship is just one factor to consider in determining if constructive force exists in a particular case.<sup>176</sup>

## 2. Actual Force

The MCM requires that an act of sexual intercourse be accomplished by force.<sup>177</sup> If after evaluating all the surrounding circumstances the finder of fact determines the doctrine of

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6 (C.M.A. 1987) ("The existence and reasonableness of the victim's fear of bodily harm under the totality of the circumstances are questions of fact."); *United States v. Jackson*, 25 M.J. 711 (A.C.M.R. 1987) (lack of consent found in victim's evasive actions to advances by platoon sergeant who was much larger physically than victim); *United States v. McFarlin*, 19 M.J. 790, 794 (A.C.M.R. 1985) (lack of consent found in the "passive acquiescence prompted by appellant's superior rank and position").

<sup>172</sup> 35 M.J. 432 (C.M.A. 1992).

<sup>173</sup> *Id.* at 433-34.

<sup>174</sup> *Id.* at 436.

<sup>175</sup> See *supra* note 171.

<sup>176</sup> See *infra* notes 219-23 and accompanying text.

<sup>177</sup> MCM, *supra* note 5, pt. IV, ¶ 45c(1)(b).

constructive force does not apply then the case is an actual force rape case. The MCM fails to define the evidentiary requirement for proving the element of “by force and without consent” in actual force rape cases. In *United States v. Bonano-Torres*,<sup>178</sup> COMA acknowledged the lack of a definition of actual force in the MCM. “Admittedly, the Manual explanation of the element of force in the crime of rape stops short of explaining what is sufficient force in the non-constructive force cases.”<sup>179</sup> The court ruled then determined that “Where there is no constructive force and the alleged victim is fully capable of resisting or manifesting her non-consent, more than the incidental force involved in penetration is required for conviction.”<sup>180</sup> The element of force in an actual force rape case contemplates an application of force to overcome the victim's will and capacity to resist.<sup>181</sup> The *Benchbook* defines actual force as “when the accused uses physical violence or power to compel the victim to submit against her will.”<sup>182</sup>

The determination of whether the accused's application of physical violence or power overcame the victim's will and capacity to resist or was more than the incidental force involved in penetration is determined on a case-by-case basis.<sup>183</sup> The finder of fact evaluates

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<sup>178</sup> 31 MJ 175, 179 (1990).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* (citing *United States v. Short*, 442, 16 C.M.R. 11, 16 (C.M.A. 1954)).

<sup>181</sup> *Id.* (citing *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

<sup>182</sup> *Benchbook*, *supra* note 152, at 428-29.

<sup>183</sup> *United States v. Tollinchi*, 54 M.J. 80 (2000); *United States v. Webster*, 40 M.J. 384 (1994); *United States v. Mathai*, 34 M.J. 33 (1992 C.M.A.); *Bonano-Torres*, 31 M.J. 175 (C.M.A. 1990).

the totality of the circumstances to determine whether the evidence proves force.<sup>184</sup> The finder of facts looks to the actions of the accused, the actions of the victim and all the surrounding circumstances in assessing the sufficiency of the force.<sup>185</sup> The finder of fact then must apply the facts to the legal concepts of force, resistance, consent and mistake of fact to determine if the evidence proves the element of “by force and without consent.”<sup>186</sup>

### 3. *Resistance*

The use of physical force is often very obvious, such as when the assailant uses a weapon or overpowers the victim by brute force.<sup>187</sup> If physical violence is used the element of force is met. When the application of physical force is less obvious the courts look to the victim’s actions, especially the victim’s resistance, to determine if the amount of force applied compelled the victim to submit to intercourse.<sup>188</sup> Force becomes the force necessary to overcome reasonable resistance.<sup>189</sup>

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<sup>184</sup> United States v. Webster, 40 M.J. 384, 386 (1994); United States v. Bonano-Torres, 31 M.J. 175, 179 (C.M.A. 1990); United States v. Henderson, 15 C.M.R. 268, 273 (1954).

<sup>185</sup> *Id.*

<sup>186</sup> United States v. Simpson, 55 M.J. 674, 695 (Army Ct. Crim. App. 2001).

<sup>187</sup> United States v. Clark, 35 M.J. 432, 437 (Sullivan, J., concurring).

<sup>188</sup> Bonano-Torres, 31 M.J. at 178.

<sup>189</sup> United States v. Webster, 40 M.J. 384, 387 (1994) (citing Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1105-21 (1986) (cases cited therein). “The inquiry into consent and force are virtually identical, both of which are defined in terms of the victim’s resistance; ‘forcible compulsion’ becomes the force necessary to overcome reasonable resistance.” *Id.* (quoting *Estrich*, *supra*, at 1107).

The case law concerning how much the victim of rape must resist, if at all, is unclear. In *United States v. Webster*,<sup>190</sup> the Court of Appeals for the Armed Forces (CAAF) issued an opinion in which the majority held that resistance by the victim is not required in rape cases. Then the court analyzed the victim's resistance just in case proof of resistance by the victim is required. The court found that the victim resisted and upheld the conviction.<sup>191</sup> Two judges, in *Webster*, issued concurring opinions clarifying their positions on the resistance required to sustain a rape conviction. Judge Cox and Judge Crawford wrote that nothing in Article 120(a), UCMJ, "suggests or implies that any measure of resistance is required of a rape victim."<sup>192</sup> The confusion on the resistance requirement exists because while resistance is probably not required, proof of resistance or lack thereof, is highly significant in all rape cases where the victim has the capacity to resist.<sup>193</sup> In an actual force rape case the victim must make her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances.<sup>194</sup>

When the victim has the capacity to resist the courts will look to the totality of the circumstances to determine if the element of "force and lack of consent" is proven beyond a

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<sup>190</sup> 40 M.J. 384 (1994)

<sup>191</sup> *Id.* at 388.

<sup>192</sup> *Id.*

<sup>193</sup> *United States v. King*, 32 M.J. 558, 563 (C.M.R. 1991); *United States v. Bonano-Torres*, 31 M.J. 175, 179 (C.M.A. 1990); *United States v. Townsend*, 34 M.J. 882, 884 (C.G.C.M.R.1991).

<sup>194</sup> *United States v. Tollinchi*, 54 M.J. 80, 82 (2000); *United States v. Webster*, 40 M.J. 384, 387 (1994); *United States v. Mathai*, 34 M.J. 33, 36 (1992 C.M.A.); *United States v. Palmer*, 33 M.J. 7, 9 (C.M.A. 1991).

reasonable doubt.<sup>195</sup> From evidence of resistance, the finder of fact may draw inferences as to the victim's state of mind on the factual issue of consent<sup>196</sup> and the accused's state of mind regarding the affirmative defense of mistake of fact.<sup>197</sup> While resistance is tangentially probative of the issues of consent and mistake of fact, proof of resistance is central to finding the element of force.<sup>198</sup>

An example of a case in which the victim did not resist sufficiently is *United States v. Bonano-Torres*.<sup>199</sup> Staff Sergeant (SSG) Bonano-Torres and Specialist (SPC) C finished their military duties and went out on the town. Specialist C consumed more than her normal limit of alcohol. She returned to her hotel room with SSG Bonano-Torres. Specialist C periodically awoke from either her alcohol-induced unconsciousness or sleep to discover SSG Bonano-Torres fondling her breasts or being in a state of complete undress or undressing her, and finally preparing to engage in sexual intercourse with her.<sup>200</sup> Specialist C testified that the SSG Bonano-Torres had been very persistent, and that he would continue to harass her until he got what he wanted.

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<sup>195</sup> *United States v. Webster*, 40 M.J. 384, 386 (1994); *United States v. Bonano-Torres*, 31 M.J. 175, 179 (C.M.A. 1990); *United States v. Henderson*, 15 C.M.R. 268, 273 (1954).

<sup>196</sup> *United States v. Williamson*, 24 M.J. 32, 34 (C.M.A. 1987).

<sup>197</sup> *See, e.g., United States v. Carr*, 18 M.J. 297, 299 (C.M.A. 1984) (alleged victim offered no resistance and did not scream).

<sup>198</sup> *United States v. Webster*, 40 M.J. 384, 386 (1994); *United States v. Bonano-Torres*, 31 M.J. 175, 178 (C.M.A. 1990); *United States v. King*, 32 M.J. 558, 563 (C.M.R. 1991); *United States v. Townsend*, 34 M.J. 882, 884 (C.G.C.M.R. 1991).

<sup>199</sup> *Bonano-Torres*, 31 M.J. at 178.

<sup>200</sup> *Id.* at 176.

Specialist C just wanted to go to sleep. She permitted SSG Bonano-Torres to have sexual intercourse with her because when it was over she knew he would not bother her further and she could fall back asleep. Specialist C did not yell, scream, or attempt to leave the hotel room. She did not get off the bed or otherwise attempt to get away from the SSG Bonano-Torres.<sup>201</sup> The COMA upheld the Army Court of Criminal Appeals decision to overturn SSG Bonano-Torres's rape conviction.<sup>202</sup> The court analyzed the conduct of the alleged victim and determined that based on the totality of the circumstances the victim did not act as a reasonable victim because she did not resist sufficiently to manifest her lack of consent to the accused.<sup>203</sup>

#### *4. Consent*

Military courts analyze the victim's conduct in context of the totality of the circumstances to determine whether or not the victim consented to intercourse. In an actual force rape case, the victim must make his or her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances.<sup>204</sup> The lack of

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 177.

<sup>203</sup> *Id.*

<sup>204</sup> *United States v. Tollinchi*, 54 M.J. 80, 82 (2000); *United States v. Webster*, 40 M.J. 384, 386 (1994); *United States v. Mathai*, 34 M.J. 33, 36 (1992); *United States v. Palmer*, 33 M.J. 7, 8 (C.M.A. 1991); *Bonano-Torres*, 31 M.J. 175, 179 (C.M.A. 1990).

consent required is more than mere lack of acquiescence.<sup>205</sup> The courts apply a reasonable victim standard based on the victim's age, strength and surrounding circumstances.<sup>206</sup> If the victim does not reasonably resist based on the totality of the circumstances then, the inference may be drawn that victim consented and the intercourse is not rape.<sup>207</sup>

The victim's resistance and the lack of consent requirement are closely related and often rely on the same evidence. The COMA described the inquiry into consent and force as being virtually identical, both of which are defined in terms of the victim's resistance.<sup>208</sup> The degree of force required to overcome resistance measured with reference to the mind of the victim.<sup>209</sup> The "forcible compulsion"<sup>210</sup> becomes the force necessary to overcome reasonable resistance.<sup>211</sup>

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<sup>205</sup> United States v. Webster, 40 M.J. 384, 386 (1994); United States v. Palmer, 33 M.J. 7, 8 (C.M.A. 1991); Bonano-Torres, 31 M.J. 175, 179 (C.M.A. 1990).

<sup>206</sup> United States v. Palmer, 33 M.J. 7, 10 (C.M.A. 1991); United States v. Henderson, 15 C.M.R. 268, 273 (C.M.A. 1954).

<sup>207</sup> MCM, *supra* note 5, pt. IV, ¶ 45(1)(b).

<sup>208</sup> United States v. Webster, 40 M.J. 384, 387 (1994) (citing Estrich, *Rape*, 95 YALE L.J. 1087, 1105-21 (1986) (cases cited therein). [T]he inquiry into consent and force are virtually identical, both of which are defined in terms of the victim's resistance; 'forcible compulsion' becomes the force necessary to overcome reasonable resistance[.]" *Id.* (quoting *Estrich, supra*, at 1107).

<sup>209</sup> United States v. Simpson, 55 M.J. 674, 696 (Army Ct. Crim. App. 2001).

<sup>210</sup> See *infra* notes 260 – 63 and accompanying text.

<sup>211</sup> *Webster*, 40 M.J. 384 at 387.

In *United States v. Tollinchi*,<sup>212</sup> the CAAF addressed the issue of consent. Sergeant Tollinchi, a Marine Corps recruiter, served alcohol to a new recruit and the recruit's girlfriend at the recruiting station. Sergeant Tollinchi talked the recruit and his girlfriend into getting undressed and then he convinced them to perform various sex acts on each other. He then joined the couple in the sex acts. He performed oral sex on the recruit's girlfriend and then penetrated her. The girlfriend whispered to her boyfriend to stop SGT Tollinchi, at which time the recruit pushed SGT Tollinchi away.<sup>213</sup> The CAAF overturned SGT Tollinchi's conviction because the victim did not demonstrate her lack of consent.<sup>214</sup> The court held that the victim saw what SGT Tollinchi was doing and about to do and did nothing to express her lack of consent to sexual intercourse.<sup>215</sup>

##### *5. Mistake of Fact*

The military courts recognize mistake of fact as a defense to the crime of rape. If the accused had an honest and reasonable belief that the victim consented to the act of sexual intercourse, then he is not guilty of rape.<sup>216</sup> Because the mistake must be honest and reasonable, not every mistake suffices. The accused's mistaken belief must be true and

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<sup>212</sup> 54 M.J. 80 (2000).

<sup>213</sup> *Id.* at 81.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *United States v. Langley*, 33 M.J. 278, 278 (C.M.A. 1991); *United States v. Taylor*, 26 M.J. 127, 128 (C.M.A. 1988); *United States v. Baran*, 22 M.J. 265, 267 (C.M.A. 1986).



sincere rather than feigned or mere pretext, and it must be reasonable.<sup>217</sup> To be reasonable, the belief must have been based on information, or lack of it, which would indicate to a reasonable person that the victim was consenting to the sexual intercourse.<sup>218</sup> The accused must exercise due care and cannot be reckless or negligent with respect to the truth.<sup>219</sup>

In deciding whether the accused was under the mistaken belief that the victim consented the finder of fact evaluates probability or improbability of the evidence concerning mistake of fact. The finder of fact must consider the accused's age, education, experience, prior contact with the victim, the nature of any conversations between the accused and the victim along with any other relevant information.<sup>220</sup> In *United States v. King*,<sup>221</sup> the United States Army Court of Military Review (ACMR) reversed the rape conviction of Captain (CPT) King based on mistake of fact. Captain King met Ms. R in a bar. Ms. R went to CPT King's apartment so he could play her a song he composed. Ms. R held CPT King's hand as they left the bar and sat very close to him as they drove to his apartment. At CPT King's apartment they engaged in sexual intercourse. Captain King tried to get Ms. R to perform oral sex on him, but she refused. Ms. R did not call out for help even though the intercourse

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<sup>217</sup> *Langley*, 33 M.J. at 278.

<sup>218</sup> *Id.*

<sup>219</sup> *United States v. Greaves*, 40 M.J. 432, 437 (C.M.A. 1994); *Langley*, 33 M.J. at 278; *United States v. Lewis*, 6 M.J. 581 (A.C.M.R. 1978).

<sup>220</sup> *United States v. Ginter*, 35 M.J. 799 (N.M.C.M.R. 1992).

<sup>221</sup> 32 M.J. 558 (A.C.M.R. 1991).

took place in an apartment complex. The alleged victim returned to her residence and told her husband that CPT King raped her.

At court-martial, a military judge found CPT King guilty of rape. The ACMR ruled that even if the intercourse was not consensual the government failed to prove that the accused did not have a reasonable belief that the alleged victim consented.<sup>222</sup> The ACMR's reasoned that because of the romantic nature of the contact between the alleged victim and the accused, it was possible that he reasonably believed that she consented to the intercourse.<sup>223</sup>

## V. The Need for Reform

Sexual assaults decrease military readiness and damage good order and discipline.<sup>224</sup> A Department of Veteran's Affairs (VA) study on women's health reveals that sexual assaults profoundly affect female service members.<sup>225</sup> The VA study found cases of depression occurred three times as often in women who were the victims of a sexual assault.<sup>226</sup> Another study in the Journal of Interpersonal Violence focused on post-traumatic stress disorder on female Gulf War veterans. The study concluded that sexual assault or harassment was more

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<sup>222</sup> *Id.* at 563-64.

<sup>223</sup> *Id.*

<sup>224</sup> Major Jay Stone, Understanding Sexual Assaults sl. 17 (powerpoint presentation), available at <http://www.defenselink.mil/vwac/VWAP31.ppt>.

<sup>225</sup> *Id.* (citing Journal of Traumatic Stress, Oct. 1999).

<sup>226</sup> *Id.* (citing Journal of Interpersonal Violence, Feb. 1998).

closely related to anxiety symptoms than combat stress.<sup>227</sup> A change to Article 120 could be part of a comprehensive plan to reduce sexual assaults in the military.

A change to the UCMJ is appropriate if the change promotes good order and discipline and enhances the military justice system for service members.<sup>228</sup> The proposed change to Article 120 accomplishes both. In its current form, Article 120 has four major flaws. First, the statute is outdated. The basic prohibition against rape is almost identical to the prohibition that existed during the Revolutionary War. Second, Article 120 fails to provide adequate notice of proscribed conduct.<sup>229</sup> Third, the definitions of force and consent are unclear.<sup>230</sup> The lack of clear definitions makes the notice problem worse by further blurring the distinction between legal and prohibited conduct. Fourth, all cases of nonconsensual intercourse are lumped together as rape, a potentially capital offense. If Congress changes Article 120 into a comprehensive criminal sexual misconduct article that clearly defines prohibited conduct, the change will promote good order and discipline and enhance the military justice system.

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<sup>227</sup> *Id.*

<sup>228</sup> Major General William A. Moorman, *Fifty Years of Military Justice: Does the Uniform Code of Military Justice Need to be Changed?* 48 A.F. L. REV. 185, 185 (2000).

<sup>229</sup> See *infra* notes 238 - 47 and accompanying text.

<sup>230</sup> See *infra* notes 247 - 50 and accompanying text.

#### A. The Need to Modernize Article 120, UCMJ

Both federal and state jurisdictions made significant changes to their rape and sexual assault statutes based on changes in society.<sup>231</sup> As stated in the introduction the Coast Guard Court of Appeals called on Congress to modernize Article 120.

Although we have found sufficient evidence of force and lack of consent, using the "totality of the circumstances" test, a better alternative would be explicit recognition of the trend toward defining rape as a sexual assault requiring only the lack of consent of the victim and establishing degrees of seriousness of the offense commensurate with the extent of force involved or other aggravating circumstances... In the absence of a reform of Article 120, UCMJ, we are left to the unguided ad hoc application of the trial court's classification of "degrees" of rape, as reflected in the sentence adjudged. In this regard, I wholeheartedly agree with Judge Bridgman's excellent analysis of the difficulties involved in applying Article 120(a), UCMJ, as currently enacted. In my view, we are attempting to apply a 1950's law to the post-"sexual revolution" morality [or lack of it] of the 1990's. Acknowledgment of this problem calls for change in the law.<sup>232</sup>

The Coast Guard Court described the problem of trying to apply Article 120 to the reality of rapes in modern society. Today, the vast majority of rapes or sexual assaults involve a victim and perpetrator who know each other.<sup>233</sup> Rape cases in the military are no different. The victim and the accused usually know each other and often are co-workers.<sup>234</sup> Rapes between

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<sup>231</sup> See *supra* notes 67 - 107 and accompanying text.

<sup>232</sup> United States v. Webster, 37 M.J. 675 n.8 (C.G.C.M.R. 1993).

<sup>233</sup> See *supra* note 31.

<sup>234</sup> Stone, *supra* note 224, sl. 16.

acquaintances are generally referred to as date rape or acquaintance rape. The court described the characteristics of date rape and acquaintance rape in detail.

The characteristics of date or acquaintance rape may include (1) kissing, "necking," and fondling but no consent by the victim to subsequent sexual intercourse; (2) passive resistance by the victim to the sexual advances of her attacker; (3) the attacker's disregard of the victim's statement that she does not desire to engage in sexual intercourse; (4) the absence of physical threats by the attacker to his victim; (5) the failure of the victim to seize opportunities to escape from her attacker; (6) the failure of the victim to scream or cry out; (7) little or no observable physical injury to the victim; and (8) the failure of the victim to report the rape promptly.<sup>235</sup>

The court then describe the problems with applying date rape or acquaintance rape scenarios to Article 120, as presently written.<sup>236</sup> Article 120 requires force and lack of consent. Most, if not all of the characteristics of date rape and acquaintance rape fail to demonstrate physical violence or power that compels the victim to submit against her will.

The court also recognized the increased number of women in the military and the need to protect service members from sexual assaults.<sup>237</sup> The UCMJ and MCM in their current form fail to adequately protect victims of sexual assaults that fit the definition of date rape and acquaintance rape. The prohibition against rape from the 1700s fails to adequately protect victims from rape today because the characteristics of the crime are different today. Modernizing the military prohibition against rape improves the military justice system by

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<sup>235</sup> *Webster* at 674.

<sup>236</sup> *Id.* at 674 - 75.

providing protections to service members and other potential victims of date rape and acquaintance rape.

## B. Notice

Article 120(a) fails to clearly define what conduct is prohibited by the statute. Article 120(a) simply says rape is intercourse by force and without consent of the victim. Distinguishing between prohibited and legal intercourse can be difficult because sexual intercourse between adults is not an inherently criminal act.<sup>238</sup> Although rape is a general-intent crime, it nevertheless requires proof that the accused intended to have sexual intercourse without the victim's consent.<sup>239</sup> As part of proving the requisite mens rea, the prosecution must show that the perpetrator was placed on reasonable notice that his behavior was criminal.<sup>240</sup> The United Supreme Court ruled on the notice necessary in a criminal statute in *Connally v. General Construction Co.*<sup>241</sup> "A criminal statute must not be so vague that an ordinary person cannot distinguish between criminal and innocent behavior. If "application of the law depends . . . upon the probably varying impression of juries as to

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<sup>237</sup> *Id.* at 675.

<sup>238</sup> *United States v. Clark*, 35 M.J. 432, 441 (C.M.A. 1992) (Gierke, J. dissenting).

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* (citing *Connally v. General Construction Co.*, 269 U.S. 385 (1926)).

<sup>241</sup> 269 U.S. 385 (1926).

whether given areas are or are not to be included within" the statute, "the constitutional guaranty of due process cannot be allowed to rest upon a support so equivocal."<sup>242</sup>

In a dissenting opinion in *Clark*,<sup>243</sup> Judge Gierke addresses the problem with trying to apply Article 120(a) to nonviolent sexual assaults involving a victim in possession of her mental faculties.<sup>244</sup> Judge Gierke wrote that Clark knew his conduct was criminal in that he violated a lawful general order prohibiting fraternization, but that Clark did not know he committed rape. Judge Gierke wrote, "In a rape prosecution in the military justice system, proof of the mens rea occurs by proving actual or constructive force or proving that the victim made her lack of consent reasonably manifest."<sup>245</sup> In Judge Gierke's opinion, the facts in *Clark* did not meet the definition of rape in Article 120.

If nonviolent sexual assaults on victims in possession of their mental faculties are rape, then Article 120 should provide military members adequate notice that the element of force and without consent can be accomplished without the use of force. Although ignorance of the law is generally not an excuse for criminal conduct,<sup>246</sup> both the victim and potential accuser deserve some guidance and certainty as to what constitutes the offense of rape. Article 120 fails to provide adequate notice to military members concerning nonviolent cases

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<sup>242</sup> *Id.* at 393.

<sup>243</sup> See *supra* note 159 and accompanying text.

<sup>244</sup> *Clark*, 35 M.J. at 441 (Gierke, J. dissenting).

<sup>245</sup> *Id.*

<sup>246</sup> *United States v. Gunter*, 42 M.J. 292, 299 (1995).

of rape. In *Webster*, Judge Bridgman, expressed concern about Article 120. He wrote, “as Article 120(a), UCMJ is currently applied, the offense of rape in the military justice system is guided, not by law, but by individual perceptions of the offense. This is unsatisfactory.”<sup>247</sup>

If Congress changes the UCMJ by specifically listing what constitutes criminal sexual misconduct then the problem of notice is eliminated. In addition, specifically prohibiting certain acts as criminal sexual misconduct provides clear standards of conduct for military members. An elimination of the notice problem and providing clear standards of conduct improves the military justice system by providing clear standards of conduct.

### C. Definition of Terms

The third major problem with Article 120 is that the crucial legal concepts of consent and force are not clearly defined. The MCM combines consent and force into the element of “by force and without consent” which leads to confusion. In 1992, the Coast Guard Court of Criminal Appeals wrote that, the current guidance on the elements of rape is less than lucid.<sup>248</sup> “Force and lack of consent are sometimes treated as a single element and at other times distinguished. Consent is sometimes treated as a state of mind and sometimes related to the physical manifestations of the victim conveying a lack of consent.”<sup>249</sup>

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<sup>247</sup> *United States v. Webster*, 37 M.J. 670, 683 (C.G.C.M.R. 1993) (J. Bridgman concurring).

<sup>248</sup> *Id.* at 683.

<sup>249</sup> *Id.*



The problem with unclear definitions is similar to the notice problems discussed in the previous section. The vague definitions cause problems in determining the status of the law. An elimination of the vagueness problem improves the military justice system by establishing clear standards of conduct for military members. Section VI, *infra* includes an analysis of the legal concepts of consent and force with proposed definitions for each term. These definitions form the basis for the proposed reform of Article 120.

#### D. Dividing the Offense of Rape into Degrees

A real, fair and measured justice to all service members can be achieved by adopting an article that divides nonconsensual sexual offense into degrees. Article 120(a), of the UCMJ groups all cases of nonconsensual intercourse together as rape, a potentially capital offense. The UCMJ does not grade sexual assaults based on the presence or lack of aggravating circumstances in a particular case, nor does it provide enhanced punishments for particularly egregious cases. In contrast, the federal system, the District of Columbia and forty-six of the fifty American states have nonconsensual criminal sex statutes that distinguish the most egregious cases of rape from the less egregious cases.<sup>250</sup> Section VII, *infra* includes a proposed division of rape into three degrees of criminal sexual misconduct based on the presence or absence of aggravating factors.

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<sup>250</sup> See *infra* notes 295 - 306.

## VI. Definition of Terms

The following two sections include an analysis of the legal concepts of consent and force and new definitions for the proposed UCMJ article. These definitions form the basis for the proposed reform of Article 120.

### A. Force

When analyzing the issue of force there are three options available. First, force can become the primary element of rape. Second, consent or lack of consent can be the primary element of rape.<sup>251</sup> The third alternative is to define force and consent and let the two concepts work together in rape prosecutions.

The proposed UCMJ article defines both force and consent. The inclusion of both force and consent in the proposed article allows greater flexibility in the prohibition of criminal sexual misconduct. The use of consent alone is inadequate because the term force more accurately describes rape when the defendant uses physical violence or the threat of physical violence.<sup>252</sup> The use of force alone is inadequate because the term consent more accurately describes situations involving little or no physical force. The failure to include consent in a rape or sexual assault statute can lead to acquittals in nonconsensual cases of intercourse that

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<sup>251</sup> See, e.g., ARIZ. REV. STAT. § 13-401 (2002); 11 DEL. C. § 761(h) (2001); MISS. CODE ANN. § 97-3-95 (2001); MONT. CODE ANN. § 45-5-501(1) (2002); NEB. REV. STAT. §28-318(8) (2002); UTAH CODE ANN. § 76-5-402 (2003); WIS. STAT. § 940.225(4) (2001).

<sup>252</sup> *Id.*

involve little force.<sup>253</sup> Defining force and consent also helps to differentiate between different degrees of criminal sexual misconduct.

Several civilian statutes provide good definitions of force. Connecticut defines force as “the use of a dangerous instrument or use of actual physical force or violence or superior physical strength against a victim.”<sup>254</sup> New Hampshire defines force as the “actual application of physical force, physical violence or superior physical strength.”<sup>255</sup> South Carolina defines aggravated force as the use of physical force or physical violence of a high and aggravated nature to overcome the victim or includes the use of a dangerous weapon.<sup>256</sup>

Many statutes explicitly prohibit the use of force or the threatened use of force. The District of Columbia defines force as the “use or threatened use of a weapon; the use of physical strength or violence that is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim.”<sup>257</sup> Illinois defines force or threat of force as “the use of physical violence, or the threat of force or violence ... on the victim or any other person.”<sup>258</sup> Minnesota defines force as the:

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<sup>253</sup> See *infra* notes 507 - 11 and accompanying text.

<sup>254</sup> CONN. GEN. STAT. § 53a-65(7) (2001).

<sup>255</sup> N.H. REV. STAT. ANN. § 632-A:2I(a) (2002).

<sup>256</sup> S.C. CODE ANN. § 16-3-651 (Law. Co-op. 2002).

<sup>257</sup> D.C. CODE § 22-3001(5) (2002).

<sup>258</sup> 720 ILL. COM. STAT. 5/12-12(d) (2002).

Infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the complainant or another, which (a) causes the complainant to reasonably believe that the actor has the present ability to execute the threat and (b) if the actor does not have a significant relationship to the complainant, also causes the complainant to submit.<sup>259</sup>

Many states use the term forcible compulsion in their criminal sex offense statutes.

Forcible compulsion combines actual force and the use of coercion or threats in one definition. Forcible compulsion describes how a victim's will to resist unwanted sexual intercourse can be overcome to establish a rape or sexual assault by either the application of physical force or mental coercion. A typical definition is the use of physical force to overcome the victim's resistance or the use of threats, express or implied, that place the victim in fear of imminent death or serious physical injury to herself or another.<sup>260</sup> Oregon defines forcible compulsion as physical force or a threat, express or implied, that places a person in fear of immediate or future death or physical injury to self or another person, or in fear that the person or another person will immediately or in the future be kidnapped.<sup>261</sup> Pennsylvania defines forcible compulsion as use of physical, intellectual, moral, emotional or psychological force, either express or implied.<sup>262</sup>

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<sup>259</sup> MINN. STAT. § 609.341 subdiv. 3 (2002).

<sup>260</sup> See, e.g., ALA. CODE § 13A-6-60 (Michie 2002); ARK. CODE ANN. §5-14-101(2) (2002); KY. REV. STAT. § 510.040(1)(a) (2002); N.Y. PENAL LAW § 130.00 (2002).

<sup>261</sup> OR. REV. STAT. § 163.305 (2001).

<sup>262</sup> 18 PA. CONS. STAT. § 3101 (2002).

The proposed change to the MCM definition of force draws from several of the definitions of force listed above. The proposed definition includes the use and threatened use of force similar to many civilian jurisdictions.<sup>263</sup> The proposed definition includes the use of weapons in the definition of force similar to Connecticut, Washington D.C. and South Carolina.<sup>264</sup> The proposed definition of force excludes some of the provisions included in the definitions discussed above because proposed definition of consent includes these provisions. The proposed change to the definition of force is:

*Force.* (1) The use, possession, display or threaten use of a dangerous weapon; (2) the use of physical force, strength or violence that overcomes the victim; (3) the use of threats of force or violence directed at the victim or another, that compel submission of the victim, threats can be present threats or future threats.<sup>265</sup>

## B. Consent

The MCM says that if an individual consents to the act of sexual intercourse then it is not rape.<sup>266</sup> The MCM does not define consent instead it defines lack of consent. The MCM definition of lack of consent is that the victim must express more than mere acquiescence, which requires the victim to take such measures of resistance as are called for by the

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<sup>263</sup> See *supra* notes 258 - 59 and accompanying text.

<sup>264</sup> See *supra* notes 254 - 57 and accompanying text.

<sup>265</sup> See *infra* app.

<sup>266</sup> MCM, *supra* note 5, pt. IV, ¶ 45c(1)(b).

circumstances.<sup>267</sup> This definition creates confusion because it fails to provide clear guidance on what consent or lack of consent means in the context of a rape prosecution.<sup>268</sup> The case law fails to provide a clear definition of lack of consent as well.<sup>269</sup>

Nine American jurisdictions define consent in their statutes prohibiting rape or sexual assault.<sup>270</sup> Vermont defines consent as “words or actions by a person indicating a voluntary agreement to engage in a sexual act.”<sup>271</sup> In Washington, consent means, “at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreements to have sexual intercourse or sexual contact.”<sup>272</sup>

At least three states specifically address the issue of consent as it relates to a current or previous relationship. California defines consent as “positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved. A current or previous dating or marital relationship shall not be sufficient to constitute consent.”<sup>273</sup> Colorado’s definition of

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<sup>267</sup> *Id.*

<sup>268</sup> *See supra* notes 248-49 and accompanying text.

<sup>269</sup> *Id.*

<sup>270</sup> CAL. PENAL CODE § 261.6 (Deering 2003); COLO. REV. STAT. § 18-3-402(5)(a)(I) (2002); D.C. CODE § 22-3001 (2002); FLA. STAT ANN. § 794.011(1)(a) (2002); ILL. COMP. STAT. 5/12-17 (2001); MINN. STAT. § 609.341 (2002); VT. STAT. ANN. tit. 13, § 3251 (2002); WASH. REV. CODE § 9A.44.010 (2002); WIS. STAT. § 940.225(4) (2001).

<sup>271</sup> VT. STAT. ANN. tit. 13, § 3251 (2002).

<sup>272</sup> WASH. REV. CODE § 9A.44.010 (2002).

<sup>273</sup> CAL. PENAL CODE § 261.6 (Deering 2003).

consent is similar to California's, "cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. A current or previous relationship shall not be sufficient to constitute consent."<sup>274</sup> In Minnesota, consent means:

Words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor. Consent does not mean the existence of a prior or current social relationship between the actor and the complainant or that the complainant failed to resist a particular act.<sup>275</sup>

Some states address the issue of resistance by the victim in their definition of consent. The District of Columbia defines consent as "words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats or coercion by the defendant shall not constitute consent."<sup>276</sup> Florida defines consent as "intelligent, knowing and voluntary consent and does not include coerced submission. Consent shall not be deemed or construed to mean the failure by the alleged victim to offer physical resistance."<sup>277</sup> Illinois defines consent as:

A freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not

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<sup>274</sup> COLO. REV. STAT. § 18-3-402(5)(a)(I) (2002).

<sup>275</sup> MINN. STAT. § 609.341 (2002).

<sup>276</sup> D.C. CODE § 22-3001 (2002).

<sup>277</sup> FLA. STAT. ANN. § 794.011(1)(a) (2002).

constitute consent. The manner of dress of the victim at the time of the offense shall not constitute consent.<sup>278</sup>

Wisconsin both defines consent and creates a rebuttable presumption of incapacity to consent in certain circumstances.<sup>279</sup> The Wisconsin statute defines consent as “words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact.”<sup>280</sup> Consent is not an issue when the victim is incapable of consent because they are incapable of appraising their conduct because they are mentally impaired, under the influence of an intoxicant, unconscious or a patient or resident of certain state facilities and engage in intercourse with the employees of the state facility. The defendant can rebut the presumption of incapacity.<sup>281</sup>

Many jurisdictions define lack of consent rather than defining consent.<sup>282</sup> The Arizona definition of lack of consent provides an example of a comprehensive definition that specifically prohibits a wide variety of conduct.<sup>283</sup> Arizona defines lack of consent as when the victim is coerced by threats of force, or when the victim is incapable of consent because “of mental disorder, mental defect, drugs, alcohol, sleep or any other similar impairment of

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<sup>278</sup> ILL. COMP. STAT. 5/12-17 (2001).

<sup>279</sup> WIS. STAT. § 940.225(4) (2001).

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> See *infra* notes 283 - 88.

<sup>283</sup> ARIZ. REV. STAT. § 13-401 (2002).



cognition” or when the victim is deceived regarding the nature of the act or deceived so they believe they are engaging in intercourse with their spouse.<sup>284</sup>

Some state jurisdictions use “no means no” to define lack of consent. Nebraska and Utah include in their definition of without consent cases when the victim expresses his or her lack of consent through words or conduct.<sup>285</sup> New York defines lack of consent as when the victim fails to expressly or impliedly acquiesce to the sexual act.<sup>286</sup> Other states expand the definition of lack of consent to strictly prohibit intercourse between individuals based on status. For example, Delaware, New York and Utah define lack of consent to include cases of intercourse between certain professionals and their patients or clients.<sup>287</sup> Montana and New York include a provision stating that individuals incarcerated in correctional facilities cannot consent to sexual activity with those who work at the facility.<sup>288</sup>

Statutes that define consent are superior to statutes that define lack of consent. Defining rape in terms of the victim's lack of consent does not accurately characterize what is actually criminal about rape. Rape is an act of violence, anger, and power, distinguished by its

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<sup>284</sup> *Id.*

<sup>285</sup> NEB. REV. STAT. § 28-318 (2002); N.Y. PENAL LAW § 130.05 (2002); UTAH CODE ANN. § 76-5-406 (2003).

<sup>286</sup> N.Y. PENAL LAW § 130.05 (2002).

<sup>287</sup> DEL. CODE ANN. tit. 11 § 761(h) (2001); N.Y. PENAL LAW § 130.05 (2002); UTAH CODE ANN. § 76-5-406 (2003).

<sup>288</sup> MONT. CODE ANN. § 45-5-501 (2002); N.Y. PENAL LAW § 130.05 (2002).

coercive and sometimes brutal nature.<sup>289</sup> The essence of rape is the force or coercion used by the defendant, not the lack of consent of the victim.<sup>290</sup> The problem with focusing on the conduct of the victim is that the unfair “special rules” that governed rape prosecutions until the 1970s are allowed to influence modern prosecutions.<sup>291</sup> For example, corroboration requirements and resistance requirements are still prevalent in the analysis of the accused conduct in determining consent or a lack of consent.<sup>292</sup>

Another problem with defining rape in terms of the victim’s lack of consent is that proving lack of consent requires the proof of a negative. That is the intercourse occurred without the consent of the victim. Rape defined in terms of consent rather than lack of consent eliminates the prosecution’s burden of proving a negative. Instead, if consent were an issue at trial the burden would be on the accused to raise it as an affirmative defense.

The proposed UCMJ article defines consent rather than without consent. The proposed definition of consent combines parts of various state statutes. The proposed definition is similar to the Vermont and Washington definitions of consent because it clearly states that by words or actions a sexual partner must express their consent to intercourse. This portion of the definition prohibits intercourse where the victim does not actively resist but does not

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<sup>289</sup> Christina Tchen, *Rape Reform and a Statutory Consent Defense*, 74 J. CRIM. L. & CRIMINOLOGY 1518, 1529 (1983).

<sup>290</sup> *Id.*

<sup>291</sup> Estrich, *supra* note 30, at 1105-21.

<sup>292</sup> *Id.*

exhibit express agreement to participate in intercourse. This provision eliminates cases like *United States v. Tomlinson*,<sup>293</sup> that held that under the legal definition of rape, a victim can honestly believe that she was raped when as a matter of law she had not because she failed to make her lack of consent reasonably manifest.

The proposed definition includes the Washington D.C. and Florida prohibitions against coerced consent. The proposed definition is similar to the Wisconsin statute because the proposed definition clearly states when an individual is not capable of consenting. The definition also incorporates the provision from California, Colorado and Minnesota that says a dating relationship does not equal consent. The proposed definition of consent is:

*Consent.* Words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats or coercion by the accused shall not constitute consent. A current or previous dating relationship shall not be sufficient to constitute consent where consent is at issue. Consent is not an issue when the victim is incapable of consent because he or she is under eighteen years of age, physically helpless, or incapable of appraising his or her conduct because he or she is asleep, unconscious, mentally impaired or under the influence of an intoxicant.<sup>294</sup>

If consent is at issue the accused may raise the victim's consent as an affirmative defense.

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<sup>293</sup> 20 M.J. 897, 902 (A.C.M.R. 1985).

<sup>294</sup> See *infra* app.

## VII. Dividing the Offense of Criminal Sexual Misconduct Into Degrees

The definitions of consent and force established in the previous sections form the building blocks for the proposed revision to the UCMJ and the MCM. This section develops the remainder of the proposed UCMJ article and makes recommendations for changes to the MCM as well. This section includes an analysis of the current nonconsensual sexual assault statutes in the federal jurisdiction, Washington D.C. and all fifty states. The analysis of relevant civilian law provides examples of potential recommendations for changes to the UCMJ and the MCM.

The federal system,<sup>295</sup> the District of Columbia<sup>296</sup> and forty-six of the fifty American states adopted nonconsensual criminal sex statutes that distinguish the most egregious cases of rape from the less egregious cases.<sup>297</sup> American jurisdictions distinguish the most egregious cases of rape or sexual assault in two different ways. Many American jurisdictions divide rape or sexual assault into degrees based on the presence or absence of aggravating

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<sup>295</sup> 18 U.S.C. §§ 2241-2242 (2000) (the federal criminal sex offenses are divided into two degrees, sexual abuse and aggravated sexual abuse).

<sup>296</sup> D.C. CODE ANN. §§ 22-3002 to 3006 (2002) (sex offenses are divided into five degrees of sexual abuse).

<sup>297</sup> See *infra* notes 300 - 05.

factors in a particular case.<sup>298</sup> Other American jurisdictions authorize enhanced penalties if certain aggravated factors exist.<sup>299</sup>

Some jurisdictions retain the term rape in their criminal code and divide rape into degrees of rape.<sup>300</sup> Other states use terms other than rape, such as sexual assault,<sup>301</sup> sexual abuse,<sup>302</sup> criminal sexual conduct,<sup>303</sup> or various other names prohibiting unlawful sexual intercourse.<sup>304</sup> The jurisdictions that removed the term rape from their penal codes generally divided their criminal sex offenses (with whatever title it is given) into different degrees with different maximum punishments. A few jurisdictions do not divide rape or sexual assault into degrees

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<sup>298</sup> See *infra* notes 300 - 04.

<sup>299</sup> See *infra* note 305.

<sup>300</sup> ALA. CODE §§ 13A-6-61 to - 67 (Michie 2002); DEL. CODE ANN. tit. 11 §§ 770 – 773 (2001); KY. REV. STAT. ANN. § 510.040 – .060 (2002); LA. REV. STAT. ANN. §§ 42 – 43 (2002); MD. CODE ANN. CRIMINAL LAW §§ 3-303 to 304 (2002); MO. REV. STAT. §§ 566.030 – .070 (2001); N.Y. PENAL §§ 130.20 – .80 (2002); N.C. GEN. STAT. §§ 14-27.1 to .5 (2002); OKLA. STAT. tit. 21 § 1114 (2003); OR. REV. STAT. §§ 163.355 – .375 (2001); PA. CONS. STAT. §§ 3121 – 3124.2 (2002); S.D. CODIFIED LAWS § 22-22-1 (2002); TENN. CODE ANN. §§ 39-13-502 to -506 (2002); WASH. REV. CODE ANN. §§ 9A.44.040 – .060 (2002).

<sup>301</sup> ALASKA STAT. §§ 11.41.410 – .440 (2002); ARK. CODE ANN. §§ 5-14-103, -124 to -127 (2002); COLO. REV. STAT. § 18-3-402 (2002); CONN. GEN. STAT. §§ 53a-70 to 73 (2001); HAW. REV. STAT. §§ 707-730 to -733 (2002); 720 ILL. COMP. STAT. 5/12-13 to -16 (2001); ME. REV. STAT. ANN. tit. 17 § 253 (2001); MONT. CODE ANN. §§ 45-5-502 to -503 (2002); NEB. REV. STAT. §§ 28-319 to -320 (2002); N.H. REV. STAT. ANN. §§ 632-A:2 to -A:4 (2002); N.J. STAT. ANN. §§ 2C:14-2 to -3 (2002); R.I. GEN. LAWS §§ 11-37-2 to -8 (2002); TEX. PENAL CODE ANN. §§ 22.011 – 22.021 (2002); VT. STAT. ANN. § 3252 – 3253 (2002); W.VA. CODE §§ 61-8B-3 to -9; WIS. STAT. § 940.225 (2001); WYO. STAT. ANN. §§ 6-2-302 to -304 (Michie 2002).

<sup>302</sup> IOWA CODE ANN. §§ 709.2 – .4 (2002); S.C. CODE ANN. §§ 16-3-652 to -655 (Law. Co-op. 2002).

<sup>303</sup> MICH. COMP. LAWS §§ 750.520b – .520e (2002); MINN. STAT. §§ 609.342 – .345 (2002).

<sup>304</sup> N.M. STAT. ANN. § 30-9-11 (2002) (criminal sexual penetration); N.D. CENT. CODE. §§ 12.1-20-03 – 12.1-20-12.1-20-07 (2002) (sexual imposition).

but do have enhanced punishments if certain aggravating factors are present.<sup>305</sup> The UCMJ and four states do not divide rape or sexual assault into different degrees or provide different punishments based on the aggravating factors of a particular case.<sup>306</sup>

A review of the statutes in American jurisdictions that divide the offense of rape or sexual assault into degree shows that the statutory schemes range from the simple to the complex. The federal statute is an example of a simple division of the common law offense of rape into a statutory scheme designed to prohibit criminal sexual conduct. The federal criminal code consists of two offenses, aggravated sexual abuse<sup>307</sup> and sexual abuse. In the federal system four aggravating factors justify classifying a sexual assault as aggravated sexual abuse.<sup>308</sup> Sexual abuse applies to nonconsensual intercourse when none of the four aggravating factors justifying aggravated sexual abuse are present.<sup>309</sup> An example of a complex statutory scheme is New York. The New York scheme consists of three degrees of rape, three degrees of sodomy, three degrees of sexual abuse, four degrees of aggravated

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<sup>305</sup> ARIZ. REV. STAT. § 13-14-6 (2001); CAL. PENAL CODE § 261 (Deering 2003); FLA. STAT. ANN. § 794.011 (2002); IND. CODE ANN. § 35-42-4-1 (2002); KAN. STAT. ANN. § 21-3502 (2001); MASS. GEN. LAWS ANN. ch. 265 § 22 (2002); MISS. CODE ANN. § 97-3-95 (2001); NEV. REV. STAT. ANN. § 200.366 (2002); OHIO REV. CODE ANN. §§ 2907.02 – 2907.06 (Anderson 2002).

<sup>306</sup> GA. CODE ANN. § 16-6-1 (2002) (very similar to Article 120, UCMJ); IDAHO CODE § 18-6101 (2002); UTAH CODE ANN. § 76-5-402 (2002) (very similar to Article 120, UCMJ); VA. CODE ANN. § 18.2-61 (2002).

<sup>307</sup> 18 U.S.C. § 2241 (2000).

<sup>308</sup> The four aggravating factors justifying aggravated sexual abuse are intercourse with: (1) children under twelve (2) accomplished by the use of force or threats of death or great bodily injury, (3) the use of drugs to impair the victim, (4) when the accused has rendered the victim unconscious. 18 U.S.C. § 2241.

<sup>309</sup> Sexual abuse is defined as intercourse (1) when the victim is unconscious but not through the actions of the accused, (2) when the victim is incapable of appraising the nature of the conduct, (3) if the intercourse is obtained by threats other than threats of death or great bodily injury. 18 U.S.C. § 2242.

sexual abuse, two degrees of sexual conduct against a child, sexual misconduct, forcible touching, and persistent sexual abuse.<sup>310</sup>

Most American jurisdictions that divided the offense of rape or sexual assault into degrees adopted statutes that are between the simple and complex statutory schemes described above. Because each jurisdiction has the power to regulate conduct to protect the health, safety and morals of people within its borders, there is no uniform approach to defining which aggravating factors justify the highest degree of rape or sexual assault. Rather, each state fashioned its criminal code to carry out its policy objectives, and the states do not attempt to conform to a common structure.

Determining which aggravating factors justify classification, as a higher versus a lower degree of rape or sexual assault can be a difficult task. The methods by which human beings accomplish nonconsensual sexual activity with fellow humans are almost limitless. One author described the methods as follows.

They use physical force; they beat, choke and knock their victims unconscious. They kidnap and restrain them. They use weapons and threats of immediate force to subdue their quarry. They come in groups with the superior strength of their number. They exploit the element of surprise. They coerce, extort and blackmail others into sexual submission. They lie, pretend, impersonate, and defraud, trapping the unwary in webs of deceit. They victimize mentally ill, mentally disabled, physically weak, and physically incapacitated persons. They abuse their positions of trust and authority to

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<sup>310</sup> N.Y. PENAL LAW §§ 130.20 – .80.

overcome their patients, clients, students, foster children, and prisoners. They sexually assault members of their own family. They prey on children.<sup>311</sup>

The proposed UCMJ article prohibits nonconsensual sexual intercourse in a variety of different circumstances. Some of the prohibitions exceed the current prohibition against rape. The title chosen for the proposed UCMJ article is criminal sexual misconduct. The title criminal sexual misconduct more accurately describes the prohibited conduct than the title rape.

The proposed UCMJ article divides the offense of criminal sexual misconduct into three degrees based on the presence or absence of aggravating factors. The proposed article classifies the most egregious cases of sexual misconduct as first-degree criminal sexual misconduct. The criterion for classification as a first-degree offense is based on the actual or potential harm to the victim. First-degree criminal sexual misconduct consists of the seven most aggravated cases of nonconsensual sexual assault. Criminal sexual misconduct in the first-degree includes sexual intercourse with any of the following aggravating factors: (1) the use or threatened use of dangerous weapons; (2) serious injury to the victim or another; (3) sexual assaults committed by multiple perpetrators; (4) if the accused incapacitates the victim; (5) if the accused is HIV positive; (6) if the victim is under fourteen; (7) if the accused is a parent or guardian of the victim.

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<sup>311</sup> Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131 (2002).



The offense of criminal sexual misconduct in the second-degree applies to aggravated cases of criminal sexual misconduct that do not rise to the level of first-degree criminal sexual misconduct. Second-degree offenses pose less risk of long-term injuries to the victim or involve less culpability on the part of the accused compared to the first-degree offenses. Criminal sexual misconduct in the second-degree include sexual intercourse with any of the following aggravating factors: (1) if the accused uses force without the presence of any other aggravating factor; (2) if the accused uses coercion without the presence of any other aggravating factors; (3) if the accused abuses a position of authority; (4) if the victim is mentally incapacitated not due to the actions of the accused; (5) if the victim is mentally handicapped; (6) if the victim is less than sixteen but older than thirteen and the accused is at least four years older than the victim.

A person is guilty of criminal sexual misconduct in the third-degree when; under circumstance not constituting criminal sexual misconduct in the first or second-degrees, such person engages in sexual intercourse with another, where (1) the victim did not consent; or (2) if the victim is less than eighteen but older than fifteen and the accused is at least four years older than the victim. Third-degree offenses expose victims to the lowest risk of serious injuries. The accused's culpability decreases because he or she does not use violence or the threat of violence or take advantage of a helpless victim.

## A. Dangerous Weapons

American jurisdictions are split on the best method to prohibit the use of dangerous weapons in sexual assaults. Many states specifically include the use of dangerous weapons in the statute prohibiting rape or sexual assault.<sup>312</sup> For example, the Colorado sexual assault statute provides that, “Any actor who knowingly inflicts sexual intrusion or sexual penetration on a victim commits sexual assault if ... [t]he actor is armed with a deadly weapon.”<sup>313</sup>

The federal statute and some state statutes do not specifically prohibit the use of dangerous weapons.<sup>314</sup> Instead, these statutes prohibit the use of force, forcible compulsion or threats that place the victim in fear of bodily injury. The federal statute defines aggravated sexual abuse as intercourse obtained by the use of threats that place the victim in “fear of death, serious bodily injury or kidnapping.”<sup>315</sup> In jurisdictions that do not specifically include the use of dangerous weapons in the rape or sexual assault statutes, the finder of fact

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<sup>312</sup> See, e.g., COLO. REV. STAT. § 18-3-402(5)(a)(III) (2002); 11 DEL. C. § 773(a)(3) (2001); 720 ILL. COM. STAT. 5/12-12(d) (2002); LA. REV. STAT. ANN. § 14:42.A(3) (2002); MD. CODE ANN. CRIMINAL LAW § 3-303(a)(2) (2002); MICH. COMP. LAWS § 750.520b(e) (2002); MINN. STAT. § 609.342(d) (2002); N.J. STAT. ANN. § 2C:14-2a(4) (2002); N.C. GEN. STAT. § 14-27.2(a)(2)a (2002); TENN. CODE ANN. § 39-13-502(a)(1) (2002); TEX. PENAL CODE ANN. § 22.021(a)(2)(A)(iv) (2002); UTAH CODE ANN. § 76-5-405(1)(b) (2003); VT. STAT. ANN. § 3253(a)(5) (2002); WASH. REV. CODE ANN. § 9A.44.040(1)(a) (2002); W.VA. CODE § 61-8B-3(a)(1)(ii) (2003); WIS. STAT. § 940.225(1)(b) (2001).

<sup>313</sup> COLO. REV. STAT. § 18-3-402(5)(a)(III) (2002).

<sup>314</sup> See, e.g., 18 U.S.C. § 2241 (2000); ALA. CODE § 13A-6-60 (Michie 2002); CONN. GEN. STAT. § 53a-65(7) (2001); D.C. CODE § 22-3001 (2002); KY. REV. STAT. ANN. § 510.040 (2002); S.C. CODE ANN. § 16-3-651 (Law. Co-op. 2002).

<sup>315</sup> 18 U.S.C. § 2241 (2000).

must determine if the use of a dangerous weapon in a sexual assault fits the definition of force, forcible compulsion or threats that place the victim in fear of bodily injury.

Specifically listing the use of dangerous weapons in the rape or sexual assault statute is superior to not listing dangerous weapons. Putting the use of a dangerous weapon in the statute makes clear that the use of a dangerous weapon during a sexual assault is strictly prohibited. Including the dangerous weapon language into the proposed UCMJ article allows the classification of sexual assaults with dangerous weapons as an aggravated sexual assault justifying a higher penalty.

Jurisdictions specifically prohibiting the use of dangerous weapons in their rape or sexual assault statutes classify such rapes or sexual assaults as aggravated offenses.<sup>316</sup> In the jurisdictions that divide the offense of rape or sexual assault into degrees, nearly every jurisdiction classifies rape or sexual assaults involving dangerous weapons as the highest-

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<sup>316</sup> See *infra* notes 317 - 18.

level offense.<sup>317</sup> In other jurisdictions the use of a dangerous weapon during a sexual assault is an aggravating factor authorizing an enhanced punishment.<sup>318</sup>

The use of a dangerous weapon poses a great risk to the victim's health and puts his or her life in danger. The potential danger to the victim makes the sexual assault aggravated. The proposed UCMJ article specifically prohibits the use of a dangerous weapon during a sexual assault and classifies sexual assaults involving the use of a weapon as first-degree sexual misconduct. The proposed UCMJ article for sexual assaults involving the use of a dangerous weapon is:

Dangerous Weapons. Any person subject to this chapter who commits an act of nonconsensual intercourse and displays a dangerous weapon, or an object that the accused uses in a manner to cause the victim to believe it is a dangerous weapon, or if the accused represents that he or she is armed with a dangerous weapon the accused is guilty of criminal sexual misconduct in the first-degree.<sup>319</sup>

American jurisdictions use a variety of definitions for the term dangerous weapon. The MCM currently defines a dangerous weapon "as a weapon used in a manner likely to

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<sup>317</sup> See, e.g., COLO. REV. STAT. § 18-3-402(5)(a)(III) (2002); 11 DEL. C. § 773(a)(3) (2001); 720 ILL. COM. STAT. 5/12-12(d) (2002); LA. REV. STAT. ANN. § 14:42.A(3) (2002); MD. CODE ANN. CRIMINAL LAW § 3-303(a)(2) (2002); MICH. COMP. LAWS § 750.520b(e) (2002); MINN. STAT. § 609.342(d) (2002); N.J. STAT. ANN. § 2C:14-2a(4) (2002); N.C. GEN. STAT. § 14-27.2(a)(2)a (2002); TENN. CODE ANN. § 39-13-502(a)(1) (2002); TEX. PENAL CODE ANN. § 22.021(a)(2)(A)(iv) (2002); UTAH CODE ANN. § 76-5-405(1)(b) (2003); VT. STAT. ANN. § 3253(a)(5) (2002); WASH. REV. CODE ANN. § 9A.44.040(1)(a) (2002); W.VA. CODE § 61-8B-3(a)(1)(ii) (2003); WIS. STAT. § 940.225(1)(b) (2001).

<sup>318</sup> See, e.g., D.C. CODE § 22-3002 (2002); IND. CODE ANN. § 35-42-4-1(b)(2) (Michie 2002); MASS. GEN. LAWS ANN. ch. 265 § 22 (2002).

<sup>319</sup> See *infra* app.

produce death or grievous bodily harm.”<sup>320</sup> Hawaii defines dangerous weapon in its sexual assault statutes as any “firearm, whether loaded or not, and whether operable or not, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.”<sup>321</sup> Another approach is to make a list of dangerous weapons. Iowa defines dangerous weapons as including, “any offensive weapon, pistol, revolver, or other firearm, dagger, razor, stiletto, switchblade knife, or knife having a blade exceeding five inches in length.”<sup>322</sup>

The current MCM definition of a dangerous weapon is inadequate because it requires the use of the weapon in a manner likely to produce death or grievous bodily harm. The definition fails to prohibit the displaying of a weapon. An accused displaying a weapon to a victim can be extremely coercive. The MCM definition of a dangerous weapon also fails to consider cases in which the accused claims to have a weapon and through his actions displays an item that the victim believes is a weapon. The Iowa definition specifically listing types of weapons is inadequate because the items that can be used as weapons are almost limitless. An attempt to list them all is nearly impossible.

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<sup>320</sup> MCM, *supra* note 5, pt. IV, ¶ 54c(4)(a)(I).

<sup>321</sup> HAW. REV. STAT. § 707-700 (2002).

<sup>322</sup> IOWA CODE § 702.7 (2002).

The best definition of a dangerous weapon for use in the military is the Hawaii definition. Hawaii's definition is comprehensive and specifically tailored to prohibit the use of deadly weapons in cases involving sexual assaults. The definition strictly prohibits the use of firearms and generally prohibits the use of other weapons. The dangerous weapon definition includes the accused's actual use of the weapon and the weapon's intended use. By including both the actual use and intended use of the dangerous weapon, the definition more accurately defines the criminal use of weapons in a sexual assault. The proposed revision to the MCM defining a dangerous weapon is:

*Dangerous weapon.* Any firearm, whether loaded or not, and whether operable or not, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.<sup>323</sup>

#### B. Injury to the Victim

Many state statutes classify sexual assaults resulting in serious injury to the victim as aggravated sexual assaults.<sup>324</sup> Most American jurisdictions that divide the offense of rape into degrees recognize injury to the victim as an aggravating factor justifying classification as the highest degree of rape or sexual assault.<sup>325</sup> Iowa classifies serious injury to the victim as

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<sup>323</sup> See *infra* app.

<sup>324</sup> See *infra* notes 325- 28.

<sup>325</sup> See, e.g., ALASKA STAT. § 11.41.410 (2002); 720 ILL. COM. STAT.5/12-12(d) (2002); MICH. COMP. LAWS § 750.520b (2002); MINN. STAT. § 609.342 (2002); NEV. REV. STAT. § 200.366 (2002); N.J. STAT. ANN. § 2C:14-2 (2002); N.C. GEN. STAT. § 14-27.2 (2002); N.D. CENT. CODE. § 12.1-20-03 (2002); TENN. CODE ANN. § 39-13-502 (2002); TEX. PENAL CODE ANN. § 22.011 (2002); UTAH CODE ANN. § 76-5-405 (2003); VT. STAT. ANN. §

the only aggravating factor justifying sexual abuse in the first-degree.<sup>326</sup> If an accused attacks a victim and forces the victim to have intercourse which results in serious injury to the victim then the crime justifies classification as first-degree sexual misconduct. The proposed UCMJ article classifies sexual assaults resulting in serious physical injury as criminal sexual misconduct in the first-degree.

In the jurisdictions that categorize sexual assaults resulting in serious injury as aggravated there is a split as to whether the injury must be to the victim or if it can be to another person besides the victim. In most states the injuries sustained in the sexual assault must be to the victim.<sup>327</sup> Indiana, Maryland and a few other jurisdictions recognize injury to the victim or injury to another as justifying first-degree rape.<sup>328</sup> Recognizing injury to another as an aggravating factor is a better approach than only recognizing injury to the victim. There are a number of situations in which an accused could injure another that justify classifying the sexual assault as aggravated. If an accused attacks and injures another man to facilitate the rape of that man's wife or daughter then the sexual assault is aggravated. The injury to the male plus the sexual assault on the wife or daughter is of such an aggravated nature that the

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3253 (2002); WASH. REV. CODE ANN. § 9A.44.040 (2002); W.VA. CODE § 61-8B-3 (2003); WIS. STAT. § 940.225 (2001).

<sup>326</sup> IOWA CODE § 709.2 (2002).

<sup>327</sup> See, e.g., ALASKA STAT. § 11.41.410 (2002); 720 ILL. COM. STAT. 5/12-12(d) (2002); MICH. COMP. LAWS § 750.520b (2002); MINN. STAT. § 609.342 (2002); NEV. REV. STAT. § 200.366 (2002); N.J. STAT. ANN. § 2C:14-2 (2002); N.D. CENT. CODE. § 12.1-20-03 (2002); TENN. CODE ANN. § 39-13-502 (2002); UTAH CODE ANN. § 76-5-405 (2003); WASH. REV. CODE ANN. § 9A.44.040 (2002); WIS. STAT. § 940.225 (2001).

<sup>328</sup> IND. CODE § 35-42-4-1 (Michie 2002); MD. CODE ANN. CRIMINAL LAW § 3-303 (2002); N.C. GEN. STAT. § 14-27.2 (2002); TEX. PENAL CODE ANN. § 22.011 (2002); VT. STAT. ANN. § 3253 (2002); W.VA. CODE § 61-8B-3 (2003).

assault justifies classification as a first-degree offense. There are many other scenarios that can be imagined that justify classification of sexual assaults resulting in injury to someone other than the victim as an aggravated offense. The proposed UCMJ article classifies sexual assaults resulting in serious injury to the victim or another as sexual misconduct in the first-degree.

American jurisdictions define serious bodily injury in a variety of ways. The MCM defines serious bodily injury or grievous bodily harm as “not including minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries.”<sup>329</sup> The federal statute defines serious bodily injury as, “bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, protracted loss or impairment of the function of a bodily member, organ, or mental faculty.”<sup>330</sup> Washington D.C. defines bodily injury as an “injury involving the loss of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain.”<sup>331</sup> Florida defines serious personal injury as “great bodily harm or pain, permanent disability, or permanent disfigurement.”<sup>332</sup>

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<sup>329</sup> MCM, *supra* note 5, pt. IV, ¶ 54b(4)(a).

<sup>330</sup> 18 U.S.C. § 2241 (2000) (the federal statute does not list serious injury to the victim as an aggravating factor, however the statute lists threats of serious physical injury is an aggravating factors then the statute defines serious physical injury).

<sup>331</sup> D.C. CODE ANN. §22-3001 (2002).

<sup>332</sup> FLA. STAT. ANN. § 794.011 (2002).



All of the definitions of physical injury, discussed above, provide good definitions for serious physical injuries. In many respects they are very similar. The current MCM definition of serious bodily injury or grievous bodily harm is the best. The MCM differentiates between short-term injuries such as black eyes and bloody noses and long-term injuries such as bone fractures and serious damage to internal organs. This distinction provides a good framework for distinguishing between injuries that are serious versus minor injuries. The MCM definition also includes the provision, “and other serious bodily injuries,”<sup>333</sup> which gives the court flexibility in determining whether or not an injury is serious. The MCM definition accurately describes the types of injuries that justify an enhanced penalty for sexual penetration resulting in injury to the victim. The proposed UCMJ article retains the current UCMJ definition of serious bodily injury.

The mental trauma of a sexual assault can affect a victim profoundly.<sup>334</sup> The victim may suffer long-term mental injuries that affect the victim just as profoundly as long-term physical injuries. Rape trauma syndrome (RTS) is a type of post-traumatic stress disorder recognized by the psychiatric community.<sup>335</sup> Symptoms of RTS include severe loss of

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<sup>333</sup> MCM, *supra* note 5, pt. IV, ¶ 54b(4)(a).

<sup>334</sup> JUDITH ROWLAND, *THE ULTIMATE VIOLATION* 336-37 (1985).

<sup>335</sup> Bridget A. Clarke, *Comment: Making the Woman's Experience Relevant to Rape: The Admissibility of Rape Trauma Syndrome in California*, 39 UCLA L. REV. 251, 256 (1991).

control over the victim's everyday activities, inability to eat or sleep, intestinal disorders and fears of physical abuse or death, long-term sleep disorder and depression.<sup>336</sup>

Delaware, Michigan and New Mexico list physical injuries and mental injuries in their sexual assault statutes.<sup>337</sup> Michigan lists mental anguish as part of its definition of personal injury but does not define the mental anguish in the statute.<sup>338</sup> Delaware lists serious mental or emotional injury as an aggravating factor justifying first-degree rape but does not define serious mental or emotional injury. In contrast, New Mexico provides a comprehensive definition of great mental anguish. New Mexico defines great mental anguish as “psychological or emotional damage that requires psychiatric or psychological treatment or care, either on an inpatient or outpatient basis, and is characterized by extreme behavioral change or sever physical symptoms.”<sup>339</sup> The New Mexico definition of great mental anguish identifies victims suffering long-term serious mental trauma from their attack. When an accused causes their victim to suffer long-term mental trauma as a result of a sexual assault, then the sexual assault is aggravated and justifies classification as an aggravated sexual assault.

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<sup>336</sup> *Id.*

<sup>337</sup> *See, e.g.*, 11 DEL. C. § 773 (2001); MICH. COMP. LAWS § 750.520b (2002); N.M. STAT. ANN. § 30-9-11 (2002).

<sup>338</sup> MICH. COMP. LAWS § 750.520a (2002).

<sup>339</sup> N.M. STAT. ANN. § 30-9-10 (2002).

The proposed UCMJ article classifies cases involving nonconsensual intercourse resulting in serious physical or mental injury to the victim, or another, as sexual misconduct in the first-degree because of the aggravated nature of the assault. The proposed UCMJ article and MCM definitions are:

*Injury to the Victim.* Any person subject to this chapter who commits an act of nonconsensual sexual intercourse and causes serious bodily injury or great mental anguish to the victim, or another, is guilty of criminal sexual misconduct in the first-degree.

*Serious bodily injury.* Does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries.

*Great Mental Anguish.* Psychological or emotional damage that requires psychiatric or psychological treatment or care, either on an inpatient or outpatient basis, and is characterized by extreme behavioral change or severe physical symptoms.<sup>340</sup>

### C. Force

The use of force can be both a prohibition and an aggravating factor in a sexual assault statute. The definition of force and the specific prohibition recommended for the proposed UCMJ article are discussed in section VI.A. *supra*. This section analyzes force as an aggravating factor in a sexual assault.

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<sup>340</sup> See *infra* app.

Sexual assaults accomplished by force often involve other aggravating factors. The two previous sections discussed the use of force resulting in injury to the victim and the use of force associated with a dangerous weapon. This section analyzes sexual assaults accomplished by physical force or violence without any other aggravating factor such as the use of a weapon or serious injury to the victim. For example, a bigger and stronger male may overpower a small female. The male may hold his victim down, restrain her against her will and have intercourse with her. The injuries to the victim may not rise to the level of serious physical injuries or great mental anguish discussed in the previous section.

In the jurisdictions that divide the offense of rape or sexual assault into degrees there is a split on what degree to assign sexual assault accomplished through the use of force without other aggravating factors.<sup>341</sup> Some jurisdictions, including the federal jurisdiction, classify sexual assaults accomplished through the use of force the same, regardless of the presence or absence of other aggravating factors.<sup>342</sup> Most jurisdictions that treat all cases of force the same classify sexual assaults involving the use of force as the highest degree of rape or sexual assault.<sup>343</sup>

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<sup>341</sup> See *infra* notes 343 to 44.

<sup>342</sup> See *infra* note 343.

<sup>343</sup> See, e.g., 18 U.S.C. § 2241 (2000); ALA. CODE § 13A-6-61 (Michie 2002); KY. REV. STAT. ANN. § 510.040 (2002); MO. REV. STAT. § 566.030 (2001); N.Y. PENAL § 130.35 (2002); OKLA. STAT. tit. 21 § 1114 (2003); OR. REV. STAT. § 163.375 (2001); PA. CONS. STAT. §§ 3121 (2002); TENN. CODE ANN. § 39-13-502 (2002);

Other jurisdictions require the use of force plus another aggravating factor to justify the highest degree of rape or sexual assault.<sup>344</sup> If the accused uses force without other aggravating factors the rape or sexual authorizes a lower degree of rape or sexual assault. For example, in North Carolina first-degree rape includes nonconsensual intercourse plus one of three aggravating factors.<sup>345</sup> The three aggravating factors include: the display of a weapon, serious injury to the victim, or multiple assailants.<sup>346</sup> Second-degree rape includes nonconsensual intercourse accomplished by force.<sup>347</sup>

The use of force alone makes a sexual assault aggravated. The question then becomes whether all cases involving the use of force justify classification as a first-degree offense. Clearly, sexual assaults involving force and injury to the victim are more aggravated than cases involving force but no injury. Generally, sexual assaults involving the use of dangerous weapons pose a greater potential danger than sexual assaults not involving dangerous weapons. The proposed UCMJ article distinguishes between sexual assaults involving the use of force with certain aggravating factors and the use of force without other aggravating factors. The use of force without other aggravating factors is classified as sexual misconduct in the second-degree. If another aggravating factor exists that justifies

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<sup>344</sup> DEL. CODE ANN. tit. 11 §§ 770 – 773 (2001); LA. REV. STAT. ANN. § 42.1 (2002); MD. CODE ANN. CRIMINAL LAW §§ 3-303 to 304 (2002); N.C. GEN. STAT. § 14-27.3 (2002); S.D. CODIFIED LAWS § 22-22-1 (2002); WASH. REV. CODE ANN. §§ 9A.44.040 – .060 (2002).

<sup>345</sup> N.C. GEN. STAT. § 14-27.2 (2002).

<sup>346</sup> *Id.*

<sup>347</sup> N.C. GEN. STAT. § 14-27.3 (2002).

classification as a first-degree offense then the offense is a first-degree offense. The proposed UCMJ article for the use of force without other aggravating factors is:

Use of force. Any person subject to this chapter who commits an act of nonconsensual sexual intercourse through the use of force is guilty of criminal sexual misconduct in the second-degree.<sup>348</sup>

#### D. Coercion

Closely related to intercourse accomplished through the use of force is intercourse obtained by the threatened use of force or coercion. The methods of prohibiting criminally coercive sexual intercourse vary. Many jurisdictions explicitly prohibit the use of threats or coercion. For example, the federal statute prohibits intercourse obtained by “threatening or placing” another person “in fear that any person will be subject to death, serious bodily injury, or kidnapping”<sup>349</sup>

Some states expand the definition of coercion beyond threats of death, serious injury or kidnapping. California, Colorado, Florida, New Hampshire and Rhode Island include in their state statutes threats to retaliate in the future against any person.<sup>350</sup> California and Texas prohibit threats to use the authority of a public official against any person, along with the

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<sup>348</sup> See *infra* app.

<sup>349</sup> 18 U.S.C. § 2241 (2000).

<sup>350</sup> CAL. PENAL CODE § 261(6) (Deering 2003); COLO. REV. STAT. §18-3-402(4)(b), (c) (2002); FLA. STAT. ANN. § 794.011(1)(a) (2002); N.H. REV. STAT. ANN. § 632-A:2 (2002); R.I. GEN. LAWS § 11-37-2 (2002).

traditional definition of coercion.<sup>351</sup> Some states prohibit the use of threats against property to establish non-consent.<sup>352</sup>

Many other jurisdictions lump the use of threats in with the use of force and do not distinguish between actual force and threatened force. The combined prohibition is usually contained in the state's prohibition against forcible compulsion.<sup>353</sup> The term forcible compulsion describes the act done by the accused to overbear the victim's will to resist. Forcible compulsion includes actual force, the use of threats or a combination of force and threats. The threat portion of Oregon's and Washington's forcible compulsion statutes prohibits express or implied threats that place a person in fear of "immediate or future death or physical injury to self or another person, or in fear that the person or another person will immediately or in the future be kidnapped."<sup>354</sup> Pennsylvania defines forcible compulsion as use of "physical, intellectual, moral, emotional or psychological force, either express or implied."<sup>355</sup>

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<sup>351</sup> CAL. PENAL CODE § 261(7) (Deering 2003); TEX. PENAL CODE ANN. § 22.011 (2002).

<sup>352</sup> *See, e.g.*, ALASKA STAT. § 11.41.470; ARIZ. REV. STAT. § 13-401 (2002); IDAHO CODE § 18-6110 (2002); OR. REV. STAT. § 163.305 (2001); WASH. REV. CODE § 9A.44.060 (2002).

<sup>353</sup> *See, e.g.*, ALA. CODE § 13A-6-60(8) (Michie 2002); ARK. CODE ANN. § 5-14-101(2) (2002); KY. REV. STAT. ANN. § 510.010(2) (2002); MO. REV. STAT. § 556.030 (2001); OR. REV. STAT. § 163.305 (2001); 18 PA. CONS. STAT. § 3101 (2002); WASH. REV. CODE § 9A.44.010 (2002).

<sup>354</sup> OR. REV. STAT. § 163.305 (2001); WASH. REV. CODE § 9A.44.010 (2002).

<sup>355</sup> 18 PA. CONS. STAT. § 3101 (2002).

Distinguishing between forceful sexual assaults and coercive sexual assaults is superior to combining sexual assaults into one category of forcible compulsion. The combination of sexual assaults accomplished through the use of force or coercion lumps together sexual assaults that can be significantly different. By separating sexual assaults accomplished by force and accomplished by coercion there is greater flexibility to structure the statute and to distinguishing the most aggravated sexual assaults.

The proposed definition of coercion is tailored to meet the specific needs of the military justice system. Like many civilian jurisdictions the proposed definition of coercion prohibits the use of death threats, serious bodily injury or kidnapping of anyone. The proposed definition also prohibits the use of coercive tactics that are unique to the military. The proposed definition prohibits the threatened use of adverse personnel actions against anyone. This definition of coercion is designed to protect victims in cases similar to *Bradley*<sup>356</sup> and *Hicks*,<sup>357</sup> where NCOs abused their authority to prey upon the wife and girlfriend of the military members they supervised. The proposed definition of coercion for inclusion in the MCM is:

*Coercion.* Words or circumstances that cause the victim reasonably to fear that the accused will kill, cause serious injury to, kidnap or take adverse

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<sup>356</sup> See *supra* note 164.

<sup>357</sup> See *supra* note 165.



actions against the victim or another which coercion causes the victim to submit to sexual intercourse.<sup>358</sup>

American jurisdictions are split on how to classify sexual assaults involving coercion. Several states include the use of coercion as a first-degree offense.<sup>359</sup> Other states define the use of coercion alone as a lower level offense.<sup>360</sup> The federal statute and some state statutes distinguish between types of coercion. Coercion that puts the victim in fear of any person being subject to death, serious bodily injury and kidnapping are treated as a higher degree of rape or sexual assault.<sup>361</sup> Threats that cause fear but not rising to the level of death, serious bodily injury or kidnapping are treated as lesser offenses.<sup>362</sup> Other state jurisdictions limit

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<sup>358</sup> See *infra* app.

<sup>359</sup> See, e.g., LA. REV. STAT. ANN. § 14:42.1A(1) (2002); ME. REV. STAT. ANN. tit. 17, § 253 (2001); N.H. REV. STAT. ANN. § 632-A:2 (2002); N.Y. PENAL LAW § 130.35 (2002); OHIO REV. CODE ANN. § 2907.02 (Anderson 2002); OKLA. STAT. tit. 21, § 1114 (2003); OR. REV. STAT. § 163.375 (2001); 18 PA. CONS. STAT. § 3101 (2002); R.I. GEN. LAWS § 11-37-2 (2002).

<sup>360</sup> IOWA CODE § 709.3 - .4 (2002) (second and third-degree sexual abuse); MASS. GEN. LAWS ch 265, § 22 (2002) (threats plus injury to justify highest penalty); MICH. COMP. LAWS § 750.520b (2002) (threats plus injury to justify highest penalty); S.D. CODIFIED LAWS § 22-22-1 (2002) (reserves the highest penalty for sex with a child under 10); W. VA. CODE § 61-8B-4 (2003) (reserves the highest penalty for injury occurring during the sexual assault or use of a deadly weapon during the commission of the sexual assault).

<sup>361</sup> See, e.g., 18 U.S.C. § 2241 (2000); MD. CODE ANN. CRIMINAL LAW § 3-303 (2002); N.D. CENT. CODE § 12.1-20-03 (2002); TEX. PENAL CODE ANN. § 22.021 (2002). VT. STAT. ANN. tit. 13, § 3253 (2002); WYO. STAT. ANN. § 6-2-302 (Michie 2002).

<sup>362</sup> See, e.g., 18 U.S.C. § 2242 (2000); MD. CODE ANN. CRIMINAL LAW § 3-304 (2002); N.D. CENT. CODE § 12.1-20-04 (2002); TEX. PENAL CODE ANN. § 22.011 (2002). VT. STAT. ANN. tit. 13, § 3252 (2002); WYO. STAT. ANN. § 6-2-303 (Michie 2002).

their highest-level criminal sexual offenses to the threatened use of a dangerous weapon or death.<sup>363</sup>

Some jurisdictions reserve the highest-level offense for cases involving threats plus another aggravating factor such as injury to the victim, use of a dangerous weapon or cases involving more than one assailant.<sup>364</sup> New Mexico divides the use of threats into three degrees of criminal sexual penetration. First-degree criminal sexual penetration is defined as the use of coercion and great bodily harm or mental anguish to the victim.<sup>365</sup> Second-degree criminal sexual penetration requires threats plus personal injury to the victim.<sup>366</sup> Third-degree criminal sexual penetration requires the use of threats without other aggravating factors.<sup>367</sup> Hawaii's sexual assault statute prohibits compulsion. The statute defines compulsion as the absence of consent, or a threat, express or implied, that places a person in fear of public humiliation, property damage, or financial loss.<sup>368</sup> Hawaii distinguishes between sexual assault in the first and second degrees by differentiating between strong

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<sup>363</sup> See, e.g., CONN. GEN. STAT. § 53a-70a (2001); 720 ILL. COM. STAT. 5/12-14 (2002); IND. CODE § 35-42-4-1 (Michie 2002).

<sup>364</sup> See, e.g., MINN. STAT. § 609.342 (2002); N.J. REV. STAT. § 2C:14-2 (2002); N.M. STAT. ANN. § 30-9-11 (2002); N.C. GEN. STAT. § 14-27.2 (2002); TENN. CODE ANN. § 39-13-502 (2002); WASH. REV. CODE § 9A.44.040 (2002).

<sup>365</sup> N.M. STAT. ANN. § 30-9-11 (2002).

<sup>366</sup> *Id.*

<sup>367</sup> *Id.*

<sup>368</sup> HAW. REV. STAT. ANN. § 707-700 (2002).

compulsion and compulsion.<sup>369</sup> South Carolina uses the terms aggravated coercion and coercion to distinguish between criminal sexual conduct in the first-degree and second-degree.<sup>370</sup>

The use of threats to overcome a victim's resistance makes a sexual assault aggravated. The determination of what level offense the use of threats justifies is similar to the analysis of force. The key question is whether all cases involving the use of threats justify classification as first-degree offenses. The proposed UCMJ article classifies threatened use of a dangerous weapon as criminal sexual misconduct in the first-degree.<sup>371</sup> The proposed UCMJ article distinguishes between threats involving the use of dangerous weapons from any other threat. The use of threats without other aggravating factors is classified as sexual misconduct in the second-degree. The proposed UCMJ article for the use of threats without the threatened use of dangerous weapon is:

Use of coercion. Any person subject to this chapter who commits an act of nonconsensual sexual intercourse through the use of coercion is guilty of criminal sexual misconduct in the second-degree.<sup>372</sup>

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<sup>369</sup> HAW. REV. STAT. §§ 707-730 to 731 (2002).

<sup>370</sup> S.C. CODE ANN. §§ 16-3-652 to -653 (Law. Co-op. 2002).

<sup>371</sup> See *supra* part VII.A.

<sup>372</sup> See appendix.

## E. Multiple Assailants

Many state statutes specifically identify sexual assaults or rapes committed by more than one person as aggravated. A typical state statute prohibiting rape by multiple assailants is Maryland's first-degree rape statute.<sup>373</sup> Maryland lists five aggravating factors justifying a first-degree rape charge including a rape committed "while aided and abetted by another."<sup>374</sup>

In the states that divide the offense of rape or sexual assault into degrees, most classify a rape by multiple assailants or "gang-rape" as an aggravating factor justifying the highest degree of rape or sexual assault.<sup>375</sup> In states that do not divide the offense of rape or sexual assault into degrees, many recognize the aggravated nature of a "gang-rape" by authorizing an enhanced criminal penalty for a rape or sexual assault committed by multiple assailants.<sup>376</sup> A very small minority of states including Iowa and New Mexico classify "gang-rape" as a second-degree offense.<sup>377</sup> Iowa reserves the offense of first-degree sexual abuse exclusively for sexual assaults resulting in serious injury.<sup>378</sup> New Mexico limits first-degree criminal

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<sup>373</sup> MD. CODE ANN. CRIMINAL LAW § 3-303 (2002).

<sup>374</sup> *Id.*

<sup>375</sup> See, e.g., COLO. REV. STAT. § 18-3-402(5)(a)(I) (2002); CONN. GEN. STAT. § 53a-70a (2002); FLA. STAT. ANN. § 794.023 (2002); LA. REV. STAT. ANN. § 42 (2002); MD. CODE ANN. CRIMINAL LAW § 3-303 (2002); MICH. COMP. LAW § 750.520b(1)(d) (2002); N.J. STAT. § 2C:14-2 (2002); N.C. GEN. STAT. § 14-27.2(a)(2)c (2002); TEX. PENAL CODE § 22.021 (2002); WIS. STAT. § 940.225 (2001).

<sup>376</sup> See, e.g., CAL. PENAL CODE § 264.1 (Deering 2003); CONN. GEN. STAT. § 53a-70a (2002); MONT. CODE ANN. § 45-5-503 (2002); UTAH CODE ANN. § 76-5-405 (2003).

<sup>377</sup> See, e.g., IOWA CODE § 709.3 (2002); N.M. STAT. ANN. § 30-9-10 (2002).

<sup>378</sup> IOWA CODE § 709.3.

sexual penetration statute to sexual assaults resulting in great bodily harm or great mental anguish to the victim and sexual penetration of children under thirteen.<sup>379</sup>

Gang rapes in the military expose the victim to great physical and mental harm. Gang rapes also threaten good order and discipline, unit cohesion and morale. The case of *United States v. Natkie*,<sup>380</sup> illustrates the potential devastating effects a gang rape may have in a military setting. The victim Airman Basic (AB) H was seventeen years old. She arrived at her unit five days before being invited to a dormitory party. An NCO hosted the dormitory party that the court described as follows, "As is too often the case ... the dormitory party was open to anybody in the dormitory, and copious quantities of alcohol were made available without regard to age, duty status, or condition."<sup>381</sup> Airman Basic H became intoxicated and passed out. During the night various male members of her unit came by her room. They discovered she was out of it. After discovering her condition two members of her unit retrieved a video camera. They returned to her room and taped the rape of AB H.<sup>382</sup>

The rape of an incapacitated seventeen-year-old military member by those in her unit is unacceptable in the military. Unfortunately, the risk factors are high.<sup>383</sup> Junior military members generally live in the barracks, many of which are gender integrated. The potential

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<sup>379</sup> N.M. STAT. ANN. § 30-9-10 (2002).

<sup>380</sup> No. ACM 31693, 1996 CCA LEXIS 286 (A.F. Ct. Crim. App. Sept. 20, 1996).

<sup>381</sup> *Id.* at \*1-2.

<sup>382</sup> *Id.* at \*4-5.

<sup>383</sup> See *infra* note 384.

for alcohol use and abuse is present. These factors are the most common factors cited for gang rapes.<sup>384</sup>

A sexual assault by multiple assailants is one of the most heinous and dangerous sexual assaults.<sup>385</sup> Florida's rape statute says that a rape committed by force, or against the will of the victim, by more than one person presents a great danger to the public and is extremely offensive to civilized society and deserving to be classified as rape in the first-degree.<sup>386</sup>

Gang rapes in the military expose the victims to potentially devastating effects. Gang rape adversely affect good order and discipline, and unit morale and cohesion. The proposed UCMJ article recognizes the aggravated nature of a sexual assault accomplished by multiple perpetrators on a single victim. The proposed article classifies sexual assaults accomplished by multiple perpetrators on a single victim as criminal sexual misconduct in the first-degree. The text of the proposed UCMJ article is:

Multiple Assailants. Any person subject to this chapter who commits an act of nonconsensual sexual intercourse and is aided or abetted by one or more persons is guilty of criminal sexual misconduct in the first-degree.<sup>387</sup>

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<sup>384</sup> A study comparing gang rapes to rapes involving one accused revealed that the victims of gang rape tended to be younger, the sexual assaults more severe and the number of serious injuries higher. Ullman, S.E. *A Comparison of Gang and Individual Rape Incidents*, Violence and Victims, 14, 123- 33(1998).

<sup>385</sup> *Id.*

<sup>386</sup> FLA. STAT. ANN. § 794.023 (2002).

<sup>387</sup> *See infra* app.

## F. Incapacity/Intoxicants

Many jurisdictions define intercourse with an incapacitated individual as rape or sexual assault.<sup>388</sup> The definition of incapacity varies by jurisdiction. One of the most comprehensive definitions of incapacity is found in Iowa's criminal code. Iowa separates incapacity into three sections: mental incapacity, physical incapacity and physical helplessness. Mental incapacity is when "a person is temporarily incapable of apprising or controlling the person's own conduct due to the influence of a narcotic, anesthetic, or intoxicating substance."<sup>389</sup> Physical incapacity exists when a "a person has a bodily impairment or handicap that substantially limits the person's ability to resist or flee."<sup>390</sup> Physical helplessness means that "a person is unable to communicate an unwillingness to act because the person is unconscious, asleep, or is otherwise physically limited."<sup>391</sup> The Iowa statute illustrates that incapacity exists in a variety of different circumstances, the most common of which include cases when the victim is unconscious, asleep or under the influence of intoxicants.

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<sup>388</sup> See *supra* notes 389 - 391, 393, 396 -400, 404 - 419.

<sup>389</sup> IOWA CODE § 709.1A(1) (2002).

<sup>390</sup> *Id.* § 709.1A (3).

<sup>391</sup> *Id.* § 709.1A (2).

The use of intoxicants, especially the use of “date-rape” drugs that incapacitate victims became a serious problem in the 1990s.<sup>392</sup> The federal government and some states passed legislation prohibiting intercourse with victims incapacitated through the use of date rape drugs.<sup>393</sup> Sexual assaults accomplished after the victim ingests a drug or intoxicant that incapacitates the victim follow two basic fact patterns.<sup>394</sup> The first type of case involves a victim who becomes incapacitated for reasons unrelated to the accused. The victim may knowingly consume too much alcohol or other intoxicant, which causes the victim to be incapacitated and incapable of consenting to intercourse. The assailant in this scenario takes advantage of the victim and has sexual intercourse without consent. The second scenario involves the accused procuring an intoxicant and slipping the intoxicant to the victim without his or her knowledge. After the victim becomes incapacitated by the intoxicant the accused then engages in nonconsensual intercourse with the victim.<sup>395</sup>

There are four general types of statutes that prohibit sexual assaults on victims incapacitated by intoxicants. Many criminal sexual conduct statutes specifically prohibit intercourse with a victim incapacitated by intoxicants.<sup>396</sup> Other state statutes integrate

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<sup>392</sup> National Institute on Drug Abuse, *Info Facts Rohypnol and GHB*, available at <http://www.nida.nih.gov/Infofax/RohypnolGHB.html>, (last visited Apr. 8, 2003).

<sup>393</sup> See, e.g., 18 U.S.C. § 2241 (2000); ARIZ. REV. STAT. § 13-1401(5) (2002); MONT. CODE ANN. § 45-2-101(39), (40), (57); TEX. PENAL CODE ANN. § 22.011(b)(3)-(6).

<sup>394</sup> Falk, *supra* note 311, at 133-34.

<sup>395</sup> *Id.*

<sup>396</sup> See, e.g., 18 U.S.C. 2242(b)(2) (2000); COLO. REV. STAT. § 18-3-402(4)(d); D.C. CODE ANN. 22-3002(4) (2002); LA. REV. STAT. 14:43.A(1) (2002); OHIO REV. CODE ANN. 2907.02(A)(1)a (Anderson 2002).



language regarding intoxicants into the definition of mental incapacitation and use the term mental incapacitation in their rape or sexual assault statutes.<sup>397</sup> Some jurisdictions include incapacitation caused by intoxicants as part of the analysis of the requirement that the intercourse be without the victim's consent.<sup>398</sup> Other jurisdictions include the use of intoxicants in their definition of force.<sup>399</sup> A very small number of jurisdictions, including the military, do not prohibit the use of intoxicants to incapacitate a victim anywhere in their rape or sexual assault statutes.<sup>400</sup> The military's prohibition against intercourse with victims incapacitated by intoxicants developed through case law.<sup>401</sup>

Specifically prohibiting intercourse with incapacitated victims is superior to remaining silent or placing incapacity in other legal terms such as force or consent. Remaining silent can lead to confusion on what acts of intercourse are prohibited. In *United States v. Grier*,<sup>402</sup> the victim consumed too much alcohol and passed out. After the victim passed out Private Grier had intercourse her. Private Grier told investigators that he did know it was rape.

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<sup>397</sup> See, e.g., HAW. REV. STAT. 707-730 (2002); MISS. CODE ANN. § 97-3-97(c) (2001); N.J. STAT. ANN. 2C:14-1(i) (2002); W. VA. CODE 61-8b-1(4).

<sup>398</sup> See, e.g., ARIZ. REV. STAT. § 13-1401(5) (2002); MONT. CODE ANN. § 45-2-101(39), (40), (57); TEX. PENAL CODE ANN. § 22.011(b)(3)-(6).

<sup>399</sup> See, e.g., MO. REV. STAT. §§ 556.030, .060 (2001); N.M. STAT. ANN. § 30-9-10 (2002).

<sup>400</sup> See, e.g., MCM, *supra* note 5, pt. IV, ¶ 45; NEB. REV. STAT. 28-319(1) (2002); NEV. REV. STAT. 200.366(1) (2002).

<sup>401</sup> See *United States v. Grier*, 53 M.J. 30 (C.A.A.F. 2000); *United States v. Mathai*, 34 M.J. 33 (C.M.A. 1992).

<sup>402</sup> 53 M.J. 30 (C.A.A.F. 2000).

Listing intoxicants in the prohibition against intercourse with incapacitated victim is also more effective than not mentioning intoxicants. Listing intoxicants in the statute makes it clear that the law prohibits sexual intercourse with intoxicated victims incapable of consenting to intercourse. Prohibiting intercourse with an incapacitated individual makes clear that anyone who preys upon an incapacitated victim commits an aggravated sexual assault. The proposed definition for incapacity is:

*Incapacity.* For purposes of this offense mentally incapacitated means a victim who, due to the influence of a drug, narcotic or intoxicating substance, or due to any act committed upon the victim without the victim's consent or awareness, is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of intercourse.<sup>403</sup>

In the jurisdictions that specifically prohibit intercourse with incapacitated victims there is a split as to whether or not the accused is required to incapacitate the victim. Most jurisdictions require that the accused participate in the victim's incapacity.<sup>404</sup> For example, in cases involving intoxicants, the accused must administer the drug to the victim without the victim's knowledge or consent.<sup>405</sup> A few jurisdictions extend the prohibited conduct to include cases when anyone acting with privity with the defendant administers the drug or

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<sup>403</sup> See *infra* app.

<sup>404</sup> See, e.g., 18 U.S.C. § 2241(b)(2) (2000); COLO. REV. STAT. § 18-3-402(4)(d) (2002); D.C. CODE ANN. § 22-3002(a)(4) (2002); FLA. STAT. ANN. § 794.011(4)(d) (2002); IDAHO CODE § 18-6101(4) (2002); 720 ILL. COMP. STAT. 5/12-14(a)(7) (2001); IND. CODE 35-42-4-1(b)(4) (2002); ME. REV. STAT. ANN. tit. 17-A, 253(2)(A), (3) (2001); N.H. REV. STAT. ANN. 632-A:2(1)(f) (2002); N.D. CENT. CODE 12.1-20-03(1)(B)-(C), -07(1)(C) (2000); OHIO REV. CODE ANN. 2907.02(A)(1)(a) (Anderson 2002); OKLA. STAT. tit. 21 § 1111(A)(4) (2003); 18 PA. CONS. STAT. 3121(a)(4) (2002); VT. STAT. ANN. tit. 13, 3252(a)(2) (2002); WYO. STAT. ANN. 6-2-303(a)(iii) (2002).

<sup>405</sup> *Id.*

intoxicant to the victim.<sup>406</sup> A minority of jurisdictions do not distinguish between cases when the victim was incapacitated by actions of the accused and cases when the victim became incapacitated by their own actions.<sup>407</sup>

If an accused incapacitates a victim to engage in intercourse with the victim then the accused commits an aggravated sexual assault.<sup>408</sup> The accused's culpability is not diminished if another person acting in concert with the accused incapacitates a victim. The proposed UCMJ article classifies sexual assaults in which the accused or anyone acting in concert with the accused incapacitates a victim as an aggravated sexual assault.

American jurisdictions that divide the offense of rape or sexual assault into degrees differ on whether intercourse with an incapacitated victim is a first-degree offense, second-degree offense or both depending on the accused's conduct. Some jurisdictions treat all cases of intercourse with an incapacitated individual as a first-degree offense.<sup>409</sup> Other jurisdictions

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<sup>406</sup> See, e.g., IDAHO CODE § 18-6101(4) (2002); LA. REV. STAT. ANN. 14:89.1(A)(5) (2002).

<sup>407</sup> See, e.g., CAL. PENAL CODE 261(a)(3) (Deering 2003); KAN. STAT. ANN. § 21-3502(a)(1)(C) (2001); S.D. CODIFIED LAWS 22-22-1(4) (2002); WIS. STAT. 940.225(2)(cm) (2001).

<sup>408</sup> See *infra* pp 95-96.

<sup>409</sup> See, e.g., MICH. COMP. LAWS § 750.520b (2002); MO. REV. STAT. §§ 556.030, .060 (2001); NEB. REV. STAT. § 28-319 (2002); N.H. REV. STAT. ANN. § 632-A:2 (2002).

treat all cases of intercourse with an incapacitated victim as a second or third-degree offense.<sup>410</sup>

Still other jurisdictions distinguish between cases depending on whether or not the accused caused the victim's incapacity. If the accused causes the victim's incapacity then the offense is classified as the highest-level offense or authorizes an enhanced punishment.<sup>411</sup> If the accused does not cause the victim's incapacity then the offense is lower-level offense.<sup>412</sup> The federal and Washington D.C. statutes classify sexual assaults in which the accused renders a victim unconscious or administers an intoxicant to the accused that incapacitates the victim as aggravated sexual abuse.<sup>413</sup> If the accused engages in intercourse with an incapacitated victim but does not cause the incapacity he commits the lower offense of sexual abuse.<sup>414</sup> Louisiana classifies rape as aggravated, forcible or simple.<sup>415</sup> If the accused administers an intoxicant to the victim then engages in intercourse, the offense is forcible sexual abuse.<sup>416</sup> If the accused does not cause the victim's intoxication the offense is simple

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<sup>410</sup> See, e.g., MD. CODE ANN. CRIMINAL LAW § 3-304 (2002) (second-degree rape); MINN. STAT. § 609.344(d) (2002) (criminal sexual conduct in the third-degree); N.C. GEN. STAT. § 14-27.3 (2002) (second-degree rape).

<sup>411</sup> See, e.g., 18 U.S.C. § 2241 (2000); D.C. CODE § 22-3002 (2002); LA. REV. STAT. § 14:42.1 (2002); OHIO REV. CODE ANN. § 2907.02 (Anderson 2002).

<sup>412</sup> See, e.g., 18 U.S.C. § 2242 (2000); D.C. CODE § 22-3003 (2002); LA. REV. STAT. § 14:43 (2002); OHIO REV. CODE ANN. § 2907.02 (Anderson 2002).

<sup>413</sup> 18 U.S.C. § 2241(b)(2); D.C. CODE § 22-3002.

<sup>414</sup> 18 U.S.C. § 2242(2).

<sup>415</sup> LA. REV. STAT. §§ 14:42.1 - :43 (2002).

<sup>416</sup> *Id.* § 14:42.1.

sexual abuse.<sup>417</sup> Ohio classifies cases in which the accused administers the intoxicant to the victim without the victim's consent as rape.<sup>418</sup> If the accused does not administer the intoxicant he commits the lesser offense of sexual battery.<sup>419</sup>

The approach taken in the federal system and in the District of Columbia is the best approach in dealing with sexual assault with incapacitated victims. In the federal system and the District of Columbia sexual assaults accomplished after the accused incapacitates a victim are classified as first-degree offenses. If the accused engages in nonconsensual intercourse with an incapacitated victim, but does not cause the victim's incapacity, then the accused commits a second-degree offense.

The distinction between the first-degree and second-degree offenses is based on the danger to the victim and the culpability of the accused. For example, in cases involving the use of date rape drugs, the accused must carefully plan and execute his assault. First, the accused must obtain the intoxicant. Second, the accused must slip the intoxicant to the victim without the victim's knowledge. When an accused spikes a victim's drink with a date rape drug, he puts the victim at risk because he does not know what affects the drug will have on the victim.<sup>420</sup> Date rape drugs can cause death.<sup>421</sup> Third, the accused must then move the

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<sup>417</sup> *Id.* § 14:43.

<sup>418</sup> OHIO REV. CODE ANN. § 2907.02 (Anderson 2002).

<sup>419</sup> *Id.* § 2907.03.

<sup>420</sup> For example a popular date rape drug, gamma-hydroxybutyrate (GHB) can cause nausea, vomiting, delusions, depression, vertigo, visual disturbances, seizures, respiratory distress, loss of consciousness, amnesia, coma and death. When combined with alcohol or other drugs the potential for death greatly increases. National

victim to a location where the assault can take place. Fourth, the accused must hide the crime. The culpability of the accused and the danger to the victim in cases when the accused incapacitates the victim justifies classification as first-degree criminal sexual misconduct. Clearly the accused's conduct mandates a higher degree of punishment than an individual who takes advantage of a situation in which an individual is intoxicated. While both of these crimes are horrible, if the accused causes the victim's incapacity, then his criminal conduct is more culpable.

The proposed UCMJ article is similar to the federal statute. The proposed UCMJ article prohibits intercourse with an incapacitated victim. The classification as a first or second-degree offense depends on the accused's culpability. Sexual assaults in which the accused incapacitates the victim justify classification as sexual misconduct in the first-degree. Cases in which the accused is not involved in incapacitating the victim justify classification as second-degree sexual misconduct.

The proposed UCMJ article is different than the federal statute in one important way. The proposed article classifies cases in which another person conspires with the accused to

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Institute on Drug Abuse, *Info Facts Rohypnol and GHB*, available at <http://www.nida.nih.gov/Infofax/RohypnolGHB.html>, (last visited Apr. 8, 2003).

<sup>421</sup> GHB a date rape drug caused the deaths of two teenage girls. Ms. Hillory Farias, age seventeen, and Ms. Samantha Reid, age fifteen drank sodas laced with GHB and died shortly after drinking the sodas containing GHB. Neither victim knew someone put the GHB in her drink. Congress responded to deaths caused by the date rape drug GHB by passing the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 1999. Pub. L. No. 106-172, 114 STAT.7 (2000).

incapacitate the victim as sexual misconduct in the first-degree. The proposed revision to the UCMJ is as follows.

Incapacitated victim (first-degree). Any person subject to this chapter who (1) renders another person unconscious, or conspires with another person to renders another unconscious and then engages in intercourse with the unconscious person or (2) administers, or conspires with another to administer to another by force or threat, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct and engages in sexual intercourse with the incapacitated person commits criminal sexual misconduct in the first-degree.

Incapacitated victim (second-degree). Any person subject to this chapter who engages in intercourse with an incapacitated individual commits criminal sexual misconduct in the second-degree.<sup>422</sup>

#### G. HIV positive accused

A sexual assault by an individual with acquired immune deficiency syndrome (AIDS) or with the antibodies of the human immunodeficiency virus (HIV) is an extremely aggravated sexual assault. The victim is exposed to a long painful illness that is 100% fatal.<sup>423</sup> A judge in Oregon described the gravity of a rape committed by an HIV positive accused. Before imposing sentence, the trial judge said,

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<sup>422</sup> See *infra* app.

<sup>423</sup> Rebecca Ruby, Note: *Apprehending the Weapon Within: The Case for Criminalizing the Intentional Transmission of HIV*, 36 AM. CRIM. L. REV. 313 (1999).

You know that you carry in your body one of the most deadly and dangerous diseases to hit the earth since the 13th Century. This is a crime that approaches attempted murder, whether or not you were charged with it. It's about the -- the most reprehensible behavior I can imagine, to put an innocent girl, someone who is legally incapable of consenting, in danger of her life, in a circumstance in which she could have a prolonged illness and suffer for years, and die one of the most horrible deaths possible.<sup>424</sup>

American jurisdictions deal with the issue of AIDS and HIV and sexual assaults in different ways. Surprisingly, none of the American jurisdictions specifically list AIDS or HIV as an aggravating factor that justifies classifying the sexual assault as a first-degree offense. However, through case law at least one state treats sexual assaults by HIV positive individuals as a first-degree offense. Texas classifies cases in which the accused knows he or she is HIV positive and has intercourse as an aggravated sexual assault that causes serious bodily injury.<sup>425</sup> A few state jurisdictions specifically list an enhanced punishment for the commission of sexual assaults committed by an accused with knowledge that he or she is HIV positive.<sup>426</sup> In other jurisdictions the courts allow increased punishment based on case law.<sup>427</sup>

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<sup>424</sup> Oregon v. Guayante, 783 P.2d 1030, 1032 (Or. Ct. App. 1989).

<sup>425</sup> Zule v. Texas, 802 S.W. 2d 28 (Tex. Ct. App. 1990).

<sup>426</sup> See, e.g., CAL. PENAL CODE § 12022.85 (Deering 2003); COLO. REV. STAT. § 18-1.3-1004(1)(d) (2002); IND. CODE ANN. § 35-38-1-7.1(b)(8) (2002) WIS. STAT. ANN. § 973.017(4)(a) (2002).

<sup>427</sup> See, e.g., Oregon v. Guayante, 783 P.2d 1030, 1032 (Or. Ct. App. 1989); Perkins v. State, 559 N.W.2d 678 (Minn. 1997).



If a victim contracts AIDS from a sexual assault the victim will suffer the rest of their life because of the sexual assault. The victim's immune system slowly deteriorates.<sup>428</sup> The victim becomes vulnerable to infections that would not affect them if his or her immune system were healthy. The infections ravage the victim's body until the victim's death.<sup>429</sup> It is hard to imagine a more aggravated sexual assault. The proposed UCMJ article classifies a sexual assault by an accused that has AIDS or is HIV positive as criminal sexual misconduct in the first-degree. The text of the proposed UCMJ article is:

AIDS/HIV. Any person subject to this chapter who knows or should have known that they are infected with the AIDS virus or are HIV positive and engages in nonconsensual intercourse commits the offense of criminal sexual misconduct commits criminal sexual misconduct in the first-degree.<sup>430</sup>

#### H. Carnal Knowledge

All American jurisdictions attempt to protect young victims from sexual intercourse with adults. Children need special protection because they are not mature enough or capable of defending themselves.<sup>431</sup> Children are also incapable of making significant life-altering

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<sup>428</sup> AIDS, Health Library: Find information on AIDS at MerckSource, *available at* [http://mercksource.com/pp/us/cns/cns\\_health\\_library\\_frame](http://mercksource.com/pp/us/cns/cns_health_library_frame) (last visited Apr. 8, 2003).

<sup>429</sup> *Id.*

<sup>430</sup> *See infra* app.

<sup>431</sup> *State v. Wilson*, 685 So. 2d 1063, 1067 (La. 1996).

decisions such as the decision to engage in intercourse.<sup>432</sup> A study conducted by the National Institute of Justice and the Centers for Disease Control questioned 8000 women about their experience with rape, physical assault and stalking.<sup>433</sup> Of the women who reported being raped at some point in their life, fifty-four percent were raped before they were seventeen.<sup>434</sup> In addition to harming the victim, intercourse between adults and children imposes a burden on society due to the number of teenage pregnancies. Statistics indicate that seventy-five percent of all teenage pregnancies result from intercourse between a minor female and an adult male.<sup>435</sup> In *Michael M. v. Superior Court*,<sup>436</sup> the Supreme Court recognized society's interest in protecting children or adolescents from pregnancy as a constitutionally valid basis for enacting criminal carnal knowledge laws.<sup>437</sup>

Many jurisdictions divide the offense of carnal knowledge into two, three or four degrees based on the age of the victim.<sup>438</sup> In the jurisdictions that divide carnal knowledge into

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<sup>432</sup> Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1 (1997).

<sup>433</sup> Patricia Tjaden & Nancy Thoennes, *Prevalence, Incidence, and Consequences of Violence Against Women: Finding From the National Violence Against Women Survey* (November 1998).

<sup>434</sup> *Id.*

<sup>435</sup> Anne C. Lewis, *Lay Off the Kids*, available at <http://www.pdkintl.org/kappan/kwash971.htm> (last visited Apr. 8, 2003).

<sup>436</sup> 450 U.S. 464 (1981).

<sup>437</sup> *Id.* at 474.

<sup>438</sup> See, e.g., ALASKA STAT. §§ 11.41.434, .436, .438 (2002) (penetration offenses against victims aged under 13, 13-15, and 16-17); CAL. PENAL CODE § 288 (Deering 2003) (lewd and lascivious acts against children under 14, and 14-15); IOWA CODE §§ 709.3 - .4. (2002) (penetration offense against victim aged under 12, 12-13, and 14-15); KY. REV. STAT. ANN. §§ 510.040 to .090 (2002) (different offenses for intercourse or sodomy with victims under age 12, 14, and 16); OR. REV. STAT. §§ 163.355 to .411 (1995) (different offenses for intercourse

degrees, the higher-degree offenses apply to cases of intercourse with younger children. The age used to define the most aggravated offense differs by jurisdiction. The age established may be as low as ten, eleven or twelve.<sup>439</sup> However, the majority of American jurisdictions use higher ages, such as thirteen,<sup>440</sup> fourteen,<sup>441</sup> fifteen,<sup>442</sup> sixteen<sup>443</sup> or even eighteen.<sup>444</sup> The UCMJ does not define different level offenses based on the age of the victim.<sup>445</sup>

The proposed UCMJ article divides the offense of carnal knowledge into three degrees. The division into three degrees allows a distinction between cases involving intercourse between adults and young children, adults and older children and adults and adolescents. The proposed UCMJ article, classifies intercourse between an adult and a victim that is under fourteen years of age as first-degree sexual misconduct. If the victim is fourteen or fifteen

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or sodomy with victims under age 12, 14, 16, and 18); S.C. CODE ANN. § 16-3-655 (Law. Co-op. 2002) (sexual battery offenses for victims aged under 11, 11-14 and 14-15); WASH. REV. CODE 9A.44.073 to .089 (2002) (penetration and contact offenses against victim aged under 12, 12-13, and 14-15); WIS. STAT. ANN. §§ 948.02, .09 (2002) (penetration offenses against victim aged under 13, under 16, and 16-17); WYO. STAT. ANN. § 6-2-303 (2002) (penetration offenses against victim aged under 12, under 16, and under 18).

<sup>439</sup> See, e.g., Under 10 Years Old: S.D. CODIFIED LAWS § 22-22-1 (2002); VT. STAT. ANN. tit. 13, § 3253 (2002). Under 11: S.C. CODE ANN. § 16-3-655 (LAW. CO-OP. 2002). Under 12: 18 U.S.C. § 2241 (2000); ALA. CODE § 13A-6-61 (Michie 2002); FLA. STAT. ANN. § 794.011 (2002); KY. REV. STAT. ANN. § 510.040 (2002).

<sup>440</sup> See, e.g., 720 ILL. COMP. STAT. 5/12-14.1 (2001); MINN. STAT. § 609.342 (2002); N.H. REV. STAT. ANN. § 632-A:2(I) (2002); N.C. GEN. STAT. § 14-27.2 (2002); TENN. CODE ANN. 39-13-506 (2002).

<sup>441</sup> See, e.g., ARK. CODE ANN. § 5-14-103 (2002); IND. CODE § 35-42-4-3 (Michie 2002); KAN. STAT. ANN. § 21-3502 (2002); MISS. CODE ANN. § 97-3-95 (2001); UTAH CODE ANN. § 76-5-406 (2003).

<sup>442</sup> ARIZ. REV. STAT. ANN. § 13-1405 (2001); N.D. CENT. CODE § 12.1-20-03 (2002).

<sup>443</sup> GA. CODE ANN. § 16-6-3 (2002); MONT. CODE ANN. § 45-5-501 (2002).

<sup>444</sup> IDAHO CODE 18-6101 (2002).

<sup>445</sup> MCM, *supra* note 5, pt. IV, ¶ 45.

years old, the accused commits sexual misconduct in the second-degree. If the victim is sixteen or seventeen years old the accused commits sexual misconduct in the third-degree.

Currently, the UCMJ does not exclude from its definition of carnal knowledge cases where the victim and accused are relatively close to the same age. The federal statute and some state statutes require an age differential before criminal liability will attach.<sup>446</sup> The federal statute requires that the victim be at least four years younger than the accused to qualify as aggravated sexual abuse.<sup>447</sup> Military members may enlist with parental consent when they are seventeen.<sup>448</sup> Article 120, applies to military members who are seventeen even though he or she may only be two years older than their victim. A case involving an accused and a victim who are nearly the same age is not nearly as aggravated as case involving a larger age disparity. The proposed UCMJ article requires that the accused be at least four years older than the victim before the offense applies.

In cases of carnal knowledge there is a split on whether the accused may raise the defense of mistake of fact concerning the victim's age. Alaska and the military courts treat the defendant's mistake of fact concerning the victim's age as an affirmative defense.<sup>449</sup>

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<sup>446</sup> See, e.g., 18 U.S.C. § 2241 (2000); CAL. PENAL CODE § 261.5 (Deering 2003); D.C. CODE § 22-3008 (2002); IND. CODE § 35-42-4-9 (Michie 2002); KY. REV. STAT. ANN. §§ 510.050, .060 (2002).

<sup>447</sup> 18 U.S.C. § 2241 (2000).

<sup>448</sup> 10 U.S.C. § 505 (2002).

<sup>449</sup> See, e.g., *United States v. Langley*, 33 M.J. 278, 278 (C.M.A. 1991); *United States v. Taylor*, 26 M.J. 127, 128 (C.M.A. 1988); *United States v. Baran*, 22 M.J. 265, 267 (C.M.A. 1986); *State v. Fremgen*, 889 P.2d 1083 (Alaska Ct. App. 1995).

California only requires that the defendant raise enough evidence to create a reasonable doubt as to his guilt.<sup>450</sup> While Washington allows a mistake of fact defense if the victim says he or she is above a certain age, it does not allow the defense based on other factors such as the victim's appearance.<sup>451</sup>

A few American jurisdictions allow the defense of mistake of age in certain cases and not in others. The federal statute, the UCMJ and some state jurisdictions allow the mistake of fact defense for cases involving adolescents but not children.<sup>452</sup> At least one jurisdiction takes a completely different approach. Oregon allows the mistake of age defense for rape in the first or second-degree but not in the third-degree. The rationale is that the accused can avoid the higher punishments associated with the first or second-degree offenses but can not avoid liability altogether.<sup>453</sup>

The majority of states do not allow mistake of fact as a defense to carnal knowledge.<sup>454</sup> Carnal knowledge is a strict-liability crime, and the mental intent of the defendant is

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<sup>450</sup> *People v. Mayberry*, 542 P.2d 1337 (Cal. 1975).

<sup>451</sup> *State v. Bennett*, 672 P.2d 772 (Wash. 1983).

<sup>452</sup> See, e.g., 18 U.S.C. § 2241 (2000); MCM, *supra* note 5, pt. IV, ¶ 45(d); MONT. CODE ANN. § 45-5-511 (2002) (mistake of age not authorized for intercourse with children under the age of fourteen but authorized if the victim is fourteen or fifteen).

<sup>453</sup> *State v. Jalo*, 696 P.2d 14 (Or. Ct. App. 1985).

<sup>454</sup> Colin Campbell, *Annotation, Mistake or Lack of Information as to Victim's Age as Defense to Statutory Rape*, 46 A.L.R. 5th 499, 508 (1997).

irrelevant in jurisdictions that do not recognize the mistake of fact defense.<sup>455</sup> Prior to 1996, courts-martial applied the rule that it is "no defense that the accused is ignorant or misinformed as to the true age of the female."<sup>456</sup> In 1996, Congress amended the UCMJ and created a reasonable mistake of age affirmative defense to make this UCMJ provision consistent with federal law. The accused may raise the affirmative defense if he or she reasonably believed the victim was at least sixteen-years-old.<sup>457</sup> Congress made this amendment to Article 120, to conform military law to federal civilian law.<sup>458</sup> The proposed change to the UCMJ retains the mistake of fact defense for cases involving children or adolescents above fourteen years old. The defense is not available for children under fourteen years of age. The proposed UCMJ article provisions on carnal knowledge are:

Children under fourteen. Any person subject to this chapter who engages in sexual intercourse with a child under the age of fourteen commits the offense of criminal sexual misconduct in the first-degree.

Children under sixteen. Any person subject to this chapter who engages in sexual intercourse with a child older than thirteen but younger than seventeen and is at least four years older than the victim commits the offense of criminal sexual misconduct in the second-degree.

Adolescents under eighteen. Any person subject to this chapter who engages in sexual intercourse with an adolescent who is sixteen or seventeen years old

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<sup>455</sup> *Id.*

<sup>456</sup> *United States v. Schuler*, 47 M.J. 561, 562 (N-M. Ct. Crim. App. 1997).

<sup>457</sup> *Id.*

<sup>458</sup> *Id.*

and is at least four years older than the victim commits the offense of criminal sexual misconduct in the third-degree.

It is an affirmative defense to alleged carnal knowledge that — (A) the person with whom the accused committed the act of sexual intercourse had at the time of the alleged offense attained the age of fourteen years; and (B) the accused reasonably believed that that person had at the time of the alleged offense attained the age of sixteen years.<sup>459</sup>

## I. Parental Rape

“The sexual abuse of children by a parent or an individual standing in loco parentis is not, unfortunately, a rare occurrence.”<sup>460</sup> Currently, Article 120, does not specifically address the issue of intercourse between parents and their children. The military courts analyze cases involving intercourse between a parent and child to determine if the “moral, psychological, or intellectual force a parent exercises over a child” rises to the level of constructive force.<sup>461</sup> If the parental coercion rises to the level of constructive force, then the child is not required to resist and the act of intercourse alone satisfies the element of by force and without consent. There is not a per se rule that sex between a parent and child always constitutes rape.<sup>462</sup>

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<sup>459</sup> See *infra* app.

<sup>460</sup> United States v. Torres, 27 M.J. 867, 869 (A.F.C.M.R. 1989).

<sup>461</sup> United States v. Palmer, 33 M.J. 7, 8 (C.M.A. 1991).

<sup>462</sup> United States v. Dunning 40 M.J. 641, 646 (1994).

Several states protect children by criminalizing sexual relationships between parents or guardians and children.<sup>463</sup> For example, North Carolina prohibits intercourse between an accused “who has assumed the position of parent in the home” and a minor residing in the home.<sup>464</sup> Consent is not a defense to the North Carolina statute. Ohio’s sexual battery statute prohibits sexual conduct between a minor child and their natural or adoptive parent, stepparent, guardian or custodian.<sup>465</sup>

Sexual activity between a parent and a minor child is not comparable to sexual activity between two adults.<sup>466</sup> The parent wields authority over the child as an assailant might wield a weapon against his victim.<sup>467</sup> If a parent engages in intercourse with their child the parent commits a gross breach of their duty as a parent. The fact that a parent violates a child in the parent’s custody and care makes the sexual misconduct aggravated. The proposed UCMJ article creates a strict liability prohibition concerning intercourse between a parent and a minor child. The proposed UCMJ article classifies parental rape as sexual misconduct in the first-degree. The proposed changes to the UCMJ and MCM are:

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<sup>463</sup> See, e.g., ALASKA STAT. § 11.41.434 (2002) (sexual abuse of a minor in the first-degree); COLO. REV. STAT. § 18-3-405.5 (2002) (sexual assault on a child by one in a position of trust); MICH. COMP. LAWS § 750.520b (2002) (criminal sexual conduct in first-degree); N.C. GEN. STAT. § 14-27.7 (2002) (intercourse and sexual offenses with certain victims; consent no defense); OHIO REV. CODE ANN. § 2907.03 (Anderson 2002) (sexual battery).

<sup>464</sup> N.C. GEN. STAT. § 14-27.7 (2002).

<sup>465</sup> OHIO REV. CODE ANN. § 2907.03 (Anderson 2002).

<sup>466</sup> United States v. Palmer 33 M.J. 7, 9 (C.M.A. 1991); United States v. Sargeant, 33 M.J. 815, 817 (A.C.M.R. 1991); United States v. Thompson, 29 M.J. 541, 545 (A.F.C.M.R. 1989).

<sup>467</sup> Howell v. State, 636 So. 2d 1260, 1261 (Ala. 1993); State v. Etheridge, 352 S.E.2d 673 (N.C. 1987).



Parental sexual misconduct. Any person subject to this chapter who engages in intercourse with a child under the age of eighteen and is the child's natural parent, stepparent, adopted parent or legal guardian commits the offense of criminal sexual misconduct in the first-degree.

*Legal guardian.* An individual who has the legal authority and duty to care for another because of the other's infancy, incapacity or disability.<sup>468</sup>

## J. Abuse of authority

A parent abuses a position of authority when he or she engages in intercourse with his or her child. Many American jurisdictions prohibit the exploitation of other positions of authority for sexual purposes.<sup>469</sup> These sexual exploitation statutes provide protection to individuals vulnerable to exploitation by individuals who exercise control or authority over them. For example, some jurisdictions criminalize sexual relationships between teachers and students,<sup>470</sup> doctors or therapists and their patients,<sup>471</sup> and prison guards and inmates.<sup>472</sup> A

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<sup>468</sup> See *infra* app.

<sup>469</sup> See, e.g., ARK. CODE ANN. §§ 5-14-124 to -126 (2002); DEL. CODE ANN. tit. 11 §§ 770 – 773 (2001); MISS. CODE ANN. § 97-3-95 (2001); N.H. REV. STAT. ANN. § 632-A:3 (2002); N.J. STAT. ANN. § 2C:14-2 (2002); N.M. STAT. ANN. § 30-9-11 (2002); TENN. CODE ANN. § 39-13-527 (2002).

<sup>470</sup> See, e.g., ALASKA STAT. § 11.41.434 (2002); CONN. GEN. STAT. § 53A-71 (2001); 11 DEL. C. §§ 761, 770 – 773 (2001); KAN. STAT. ANN. § 21-3520 (2001); ME. REV. STAT. ANN. tit. 17 § 253 (2001); N.C. GEN. STAT. §§ 14-27.1 – 14-27.5 (2002); OKLA. STAT. tit. 21 §§ 1111, 1114 (2003).

<sup>471</sup> See, e.g., CONN. GEN. STAT. § 53A-71 (2001); COLO. REV. STAT. § 18-3-405.5 (2002); FLA. STAT. ANN. § 491.0112 (2002); GA. CODE ANN. § 16-6-5.1 (2002); IOWA CODE ANN. § 709.15 (2002); ME. REV. STAT. ANN. tit. 17 § 253 (2001); MINN. STAT. §§ 609.341, .344 – .345, .347 (2002); N.M. STAT. ANN. §§ 30-9-10, -12 (2002); N.D. CENT. CODE. § 12.1-20-06.1 (2002); S.D. CODIFIED LAW §§ 22-22-27 to -29 (2002); TEX. PENAL CODE ANN. § 22.011 (2002); WIS. STAT. ANN. § 940.22 (2002).

<sup>472</sup> See, e.g., ALASKA STAT. § 11.41.425 (2002); ARIZ. REV. STAT. § 13-1419 (2001); D.C. CODE ANN. § 22-3015 (2002); IDAHO CODE § 18-6110 (2002); 720 ILL. COMP. STAT. 5/11-9.2 (2001); IOWA CODE ANN. § 709.16 (2002); KAN. STAT. ANN. § 21-3502 (2001); ME. REV. STAT. ANN. tit. 17 § 253 (2001); MINN. STAT. § 609.344

few jurisdictions expand the definition of positions of authority even further to include certain professionals,<sup>473</sup> and religious leaders.<sup>474</sup>

By its very nature the military creates many positions of authority. The senior-subordinate relationship is critical to the accomplishment of the military mission.<sup>475</sup> Military superiors must be in a position of control. If a subordinate violates the lawful orders of<sup>476</sup> or shows disrespect to<sup>477</sup> a superior, the subordinate commits a criminal offense. The dominance and control over individuals is no more dominant than in the drill sergeant and trainee relationship. The Air Force Court of Criminal Appeals described the relationship between a basic trainee and her male military instructor this way.

This case is about sexual activity between a female basic trainee and her male military training instructor — a person cloaked by regulation, custom, and practice with authority over practically every aspect of her daily existence. More specifically, he held the awesome (to a basic trainee) power of "recycling" — of requiring the trainee to repeat basic training. To anyone who

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(2002); MONT. CODE ANN. §§ 45-5-502, -503 (2002); NEB. REV. STAT. §§ 28-319 to -320 (2002); N.C. GEN. STAT. §§ 14-27.1 – 14-27.5 (2002); N.D. CENT. CODE. § 12.1-20-06 (2002); OKLA. STAT. tit. 21 §§ 1111, 1114 (2003); PA. CONS. STAT. § 3124.2 (2002); S.D. CODIFIED LAWS § 22-22-7.6 (2002); UTAH CODE ANN. § 76-5-412 (2002); VA. CODE ANN. § 18.2-64.2 (2002); WASH. REV. CODE ANN. §§ 9A.44.160, .170 (2002); W. VA. CODE § 61-8B-10.

<sup>473</sup> See, e.g., D.C. CODE ANN. § 22-3015 (2002); N.J. STAT. ANN. § 2C:14-2 (2002); TENN. CODE ANN. § 39-13-527 (2002).

<sup>474</sup> See, e.g., OHIO REV. CODE ANN. § 2907.03 (Anderson 2002); TEX. PENAL CODE ANN. § 22.011 (2002); UTAH CODE ANN. § 76-5-406 (2003).

<sup>475</sup> Major Timothy Grammel, *Military Justice Symposium – Volume I: Justice and Discipline: Recent Developments in Substantive Criminal Law*, ARMY LAW., Apr. 2001 at pages 63-64.

<sup>476</sup> MCM, *supra* note 5, pt. IV, ¶ 14.

<sup>477</sup> MCM, *supra* note 5, pt. IV, ¶ 13.

has been through this or a similar regimen, the terror inspired by the threat of having to go through it again is very real.<sup>478</sup>

The prevention of sexual abuse against recruits, trainees, advanced individual training students, junior enlisted personnel, students attending service academies and other potentially vulnerable victims is crucial to maintain good order and discipline in the United States military. The United States military gives officers, NCOs, drill sergeants, recruiters, cadre and others the right and obligation to exercise control over those they supervise. Unfortunately, some military members abuse their positions of authority and act as sexual predators.<sup>479</sup> A sexually predator in a position of authority is detrimental to the good order and discipline of a unit.<sup>480</sup>

Currently, cases involving intercourse between recruiter and recruit, drill sergeant and trainee, and supervisor and subordinate are usually dealt with through punitive regulations.<sup>481</sup> The most egregious cases are prosecuted as rape involving constructive force.<sup>482</sup> The current

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<sup>478</sup> United States v. McCreary, No. ACM 30753, 1995 CCA LEXIS 84 (A.F. Ct. Crim. App. Feb. 15, 1995).

<sup>479</sup> Grammel *see supra* note 475 (*citing* United States v. Johnson, 54 M.J. 67, 72 (2000) (Sullivan, J., dissenting)).

<sup>480</sup> *Id.*

<sup>481</sup> *See, e.g.*, U.S. DEPT. OF ARMY REG. 600-20, ARMY COMMAND POLICY ¶¶ 4-14 to -15 (2002); UNITED STATES ARMY RECRUITING COMMAND, REG. 600-25 (prohibiting improper relationship between recruiters and recruits).

<sup>482</sup> *See generally* United States v. Clark, 35 M.J. 432 (C.M.A. 1992) ("the unique situation of dominance and control presented by appellant's superior rank and position"); United States v. Bradley, 28 M.J. 197, 200 (C.M.A. 1989) ("We hold . . . that this military relationship . . . created a unique situation of dominance and control where explicit threats and display of force by the military superior were not necessary."); United States v. Jackson, 25 M.J. 711 (ACMR 1987) (lack of consent found in victim's evasive actions to advances by platoon

system is inadequate because Article 120 is unclear and the case law adds further confusion.

Intercourse between a drill sergeant and a trainee may or may not be rape.<sup>483</sup> Intercourse

between a drill sergeant and a trainee's girlfriend or wife is rape in certain cases.<sup>484</sup>

Intercourse between a superior and subordinate may or may not be rape.<sup>485</sup>

The military places individuals in positions of authority to provide training, leadership and guidance to service members. The abuse of the position of trust for sexual purposes is a grave breach and merits classification as a criminal offense in the military justice system. The proposed UCMJ article specifically prohibits sexual intercourse between military members in positions of authority and those they exercise dominion and control over. The specific prohibition makes clear that sexual relationships in these circumstances are prohibited in all cases.

Jurisdictions with statutes prohibiting the abuse of a position of authority classify the offense differently. Some jurisdictions include the abuse of a position of authority in their rape or sexual assault statutes.<sup>486</sup> Other jurisdictions list abuse of authority offenses as

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sergeant); *United States v. McFarlin*, 19 M.J. 790, 794 (ACMR) (lack of consent found in the "passive acquiescence prompted by appellant's superior rank and position").

<sup>483</sup> *United States v. Simpson*, 55 M.J. 674 (Army Ct. Crim. App. 2001) ("we reject the notion that every act of intercourse between a trainee and a drill sergeant is inherently nonconsensual").

<sup>484</sup> See *supra* notes 164 - 65 and accompanying text.

<sup>485</sup> *United States v. Clark*, 35 M.J. 432 (C.M.A. 1992). "Superior rank and position of the male does not translate automatically into lack of consent of the female." *Id.* at 436 (Wiss J., concurring).

<sup>486</sup> See, e.g., 720 ILL. COMP. STAT. 5/12-13 (2002) (intercourse between an adult holding a position of trust, authority or supervision over a child who is at least thirteen and not older than seventeen is criminal sexual

separate criminal sexual misconduct statutes.<sup>487</sup> For example, Kansas has a statute that specifically prohibits sex between certain state employees and the people they are responsible for guarding, supervising, protecting or teaching.<sup>488</sup>

Other jurisdictions treat the abuse of a position of authority as an aggravating factor justifying classification as a higher degree of rape or sexual assault<sup>489</sup> or an enhanced punishment.<sup>490</sup> Some jurisdictions distinguish between different level offenses based on the

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assault); IOWA CODE ANN. § 709.4 (2002) (sexual abuse in the third-degree); N.M. STAT. ANN. § 30-9-11 (2002) (an adult who uses a position of authority over a child who is at least thirteen and not older than seventeen to obtain sexual penetration commits the offense of criminal sexual penetration); OHIO REV. CODE ANN. § 2907.03 (Anderson 2002) (sexual battery occurs when a teacher, coach, scout troop leader, health care provider or mental health professional engages in sexual conduct with another they exercise supervisory or disciplinary authority over); OKLA. STAT. tit. 21 § 1111 (2003) (Oklahoma classifies intercourse between teachers and students and certain state employees and those under the supervision of the state employees as rape); TEX. PENAL CODE ANN. § 22.011 (2002) (prohibits mental health providers, clergy and public servants from using their position to coerce the another to submit to sexual penetration); UTAH CODE ANN. § 76-5-406 (2003) (prohibits health professionals or religious counselors from engaging in intercourse with their clients).

<sup>487</sup> See, e.g., COLO. REV. STAT. § 18-3-405.3 (2002); GA. CODE ANN. § 16-6-5.1 (2002); MD. CODE ANN. CRIMINAL LAW § 3-314 (2002); MISS. CODE ANN. § 97-3-104 (2001); N.D. CENT. Code § 12.1-20-06 (2002); 18 PA. CONS. STAT. § 3124.2 (2002); S.D. CODIFIED LAW §§ 22-22-27 to -29 (2002); WASH. REV. CODE ANN. § 9A.44.093 (2002).

<sup>488</sup> KAN. STAT. ANN. § 21-3520 (2001).

<sup>489</sup> ARK. CODE ANN. § 5-14-124 (2002) (intercourse between inmates and corrections personnel, professionals in a position of trust and their clients, guardians, caretakers and teachers and those in their care is sexual assault in the first-degree); 11 DEL. C. § 773 (2001) (if a child under sixteen has intercourse with a person in a position of trust, authority or supervision then it is rape in the first-degree); MICH. COMP. LAWS § 750.520b (2002) (sexual penetration with a victim who is at least thirteen and not older than fifteen by a person in a position of authority over the victim is criminal sexual conduct in the first-degree); MINN. STAT. § 609.342 (2002) (sexual penetration with a victim who is at least thirteen and not older than fifteen by a person in a position of authority over the victim is criminal sexual conduct in the first-degree); N.H. REV. STAT. ANN. § 632-A:2 (2002) (medical personnel and people in a position of authority who use their position to obtain intercourse commit the offense of aggravated felonious sexual assault); R.I. GEN. LAWS § 11-37-2 (2002) (sexual penetration achieved through a medical procedures is first-degree sexual assault).

<sup>490</sup> D.C. CODE § 22-3020 (2002) (if the victim is under the age of eighteen and the accused had a significant relationship with the victim then the accused may receive a maximum punishment of one and one-half times the maximum punishment authorized for the particular offense).

type of authority abused. For example, Alaska treats cases of sexual penetration between a health care worker and a patient during the course of treatment as a first-degree offense.<sup>491</sup> Sexual penetration between a correction officer and a prisoner is a third-degree offense.<sup>492</sup>

The proposed UCMJ article classifies sexual misconduct committed by abusing a position of authority without other aggravating factors as a second-degree offense. The accused that abuses of his or her position authority commits an aggravated offense. The accused violates the trust bestowed upon them by the United States military. He or she takes advantage of an individual that the accused exercise dominion and control over. Intercourse by an accused in a position of authority with a victim the accused exercises dominion and control over warrants classification higher than third-degree sexual assault because of the accused's culpability. Abuse of a position of authority alone does not rise to the level of sexual misconduct in the first-degree because the sexual assault poses less potential for death, or long-term injuries compared to the first-degree offenses.

The proposed prohibition against abuse of a position of authority protects vulnerable individuals from the potentially coercive nature of the relationship. Consent is not a defense. The strict prohibition of intercourse between those in position of authority and those they supervise also protects the integrity of the relationship. The proposed changes to the UCMJ and MCM are:

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<sup>491</sup> ALASKA STAT. §11.41.410 (2002).

<sup>492</sup> *Id.* § 11.41.425 (2002).

Position of authority. Any person subject to this chapter who engages in sexual intercourse with a person that the accused is in a position of authority over commits the offense of criminal sexual misconduct in the second-degree.

*Position of authority.* A position of authority includes, but is not limited to the following relationships: drill sergeants and trainees, recruiters and recruits, seniors and subordinates in the same chain of command, between service academy personnel and service academy students, cadre and students and others in similar positions of dominance and control.<sup>493</sup>

#### K. Mentally handicapped victim

Many jurisdictions specifically prohibited the sexual exploitation of the mentally handicapped. Jurisdictions use different standards to determine if a mentally handicapped individual has the capacity to consent to intercourse. The most prevalent standard is the nature of the conduct standard.<sup>494</sup> The nature of the conduct standard requires that the mentally handicapped individual understand the sexual nature of the conduct and is voluntarily able to participate.<sup>495</sup> Georgia and Minnesota apply a test that refers to whether the victim can exercise judgment regarding consent to sexual activity.<sup>496</sup> Several other states

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<sup>493</sup> See *infra* app.

<sup>494</sup> See, e.g., ALASKA STAT. § 11.41.470 (2002); ARIZ. REV. STAT. § 13-1401 (2002); ARK. CODE ANN. § 5-14-101 (2002); 11 DEL. C. § 772 (2001); FLA. STAT. ANN. § 794.011 (2002); IOWA CODE ANN. § 709.15 (2002); LA. REV. STAT. ANN. § 43 (2002); ME. REV. STAT. ANN. tit. 17 § 253 (2001); NEB. REV. STAT. § 28-319 (2002); NEV. REV. STAT. ANN. § 200.366 (2002); N.C. GEN. STAT. § 14-27.1 (2002); N.D. CENT. CODE. § 12.1-20-03 (2002); OR. REV. STAT. § 163.305 (2001); R.I. GEN. LAWS § 11-37-1 (2002); S.C. CODE ANN. § 16-3-651 (Law. Co-op. 2002); TEX. PENAL CODE ANN. § 22.011 (2002); UTAH CODE ANN. § 76-5-406 (2002).

<sup>495</sup> *Id.*

<sup>496</sup> GA. CODE ANN. § 16-6-5.1 (2002); MINN. STAT. § 609.341 (2002).

do not have a standard or test. Instead, the court evaluates evidence of mental disability as a means of determining the victim's capacity to consent.<sup>497</sup>

Through case law the military prohibits the sexual exploitation of the mentally handicapped. The standard used at court martial is a person is capable to consent to an act of sexual intercourse unless his or her mental infirmity is so severe that he or she is incapable of understanding the act, its motive, and its possible consequences.<sup>498</sup> If the accused knew or had reasonable cause to know that victim was incapable of giving consent, the act of sexual intercourse was done by force and without consent.<sup>499</sup>

The standard used by the military is superior to the other standards. The military standard provides greater protection to handicapped individual than the civilian standards. Requiring the mentally handicapped individual to understand the act, its motive and its possible consequences exceeds the requirements of the civilian statutes discussed above. The proposed UCMJ article incorporates the current military case law concerning a mentally handicapped person's ability to consent to intercourse.

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<sup>497</sup> See, e.g., CAL. PENAL CODE § 261 (Deering 2003); CONN. GEN. STAT. § 53a-71 (2001); IND. CODE ANN. § 35-42-4-1 (2002); KY. REV. STAT. ANN. § 510.020 (2002); MONT. CODE ANN. §§ 45-5-501 (2002); OKLA. STAT. tit. 21 § 1111 (2003); PA. CONS. STAT. § 3124.2 (2002); S.D. CODIFIED LAWS § 22-22-1 (2002); VT. STAT. ANN. § 3254 (2002); W. VA. CODE § 61-8B-2 (2003).

<sup>498</sup> United States v. Henderson, 15 C.M.R. 268, 274-75 (C.M.A. 1954); United States v. Lyons, 33 M.J. 543, 548-49 (A.C.M.R. 1991).

<sup>499</sup> *Id.*



American jurisdictions classify sexual assaults with mentally handicapped individuals as sexual assaults in the first,<sup>500</sup> second<sup>501</sup> or third degree.<sup>502</sup> The proposed UCMJ article classifies nonconsensual intercourse with a mentally handicapped individual, without other aggravating factors as criminal sexual misconduct in the second-degree. The accused takes advantage of a victim who is mentally impaired, which justifies classification as an aggravated offense. The offense does not rise to the level of a first-degree offense without other aggravating factors because the harm, or potential harm, to the victim does not rise to the level of the other first-degree offenses. The proposed revisions to the UCMJ and MCM are:

**Mentally handicapped victim.** Any person subject to this chapter who engages in sexual intercourse with a person that is mentally handicapped commits the offense of criminal sexual misconduct in the second-degree.

***Mentally handicapped.*** An individual is capable to consent to an act of sexual intercourse unless his or her mental infirmity is so severe that he or she is

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<sup>500</sup> See, e.g., ARK. CODE ANN. § 5-14-103 (2002); ME. REV. STAT. ANN. tit. 17 § 253 (2001); MICH. COMP. LAWS § 750.520b (2002); NEB. REV. STAT. §§ 28-319 to -320 (2002); N.J. STAT. ANN. § 2C:14-2 (2002); N.D. CENT. CODE § 12.1-20-03 (2002); OKLA. STAT. tit. 21, § 1114 (2003); OR. REV. STAT. § 163.375 (2001); 18 PA. CONS. STAT. § 3101 (2002); TENN. CODE ANN. § 39-13-502 (2002); WIS. STAT. § 940.225 (2001); WYO. STAT. ANN. §§ 6-2-302 (Michie 2002).

<sup>501</sup> See, e.g., 18 U.S.C. § 2242 (2000); ALA. CODE § 13A-6-60 (Michie 2002); CONN. GEN. STAT. §§ 53A-70 to -73 (2001); 11 DEL. C. § 772 (2001); D.C. CODE § 22-3003 (2002); HAW. REV. STAT. § 707-731 (2001); 720 ILL. COMP. STAT. 5/12-13 to 5/12-16 (2001); MD. CODE ANN. CRIMINAL LAW § 3-304 (2002); N.Y. PENAL LAW § 130.35 (2002); N.C. GEN. STAT. § 14-27.2, .3 (2002); R.I. GEN. LAWS § 11-37-4 (2002); S.D. CODIFIED LAWS § 22-22-1 (2002); TEX. PENAL CODE ANN. §§ 22.011 – 22.021 (2002); WASH. REV. CODE § 9A.44.050 (2002); WIS. STAT. § 940.225 (2001).

<sup>502</sup> ALASKA STAT. §§ 11.41.425 (2002); IOWA CODE § 709.4 (2002); KY. REV. STAT. ANN. § 510.060 (2002); MINN. STAT. § 609.344 (2002); W.VA. CODE §§ 61-8B-3 to -9.

incapable of understanding the act, its motive, and its possible consequences.<sup>503</sup>

#### L. Without Consent

Recently, a few states passed statutes designed to prohibit nonviolent intercourse without the consent of the victim.<sup>504</sup> These statutes prohibit intercourse with a victim capable of consenting, but who does not consent. The accused does not use violence or force or coercion. Instead the accused ignores the victim telling him no or fails to obtain the affirmative consent of the victim.

An example of statute prohibiting intercourse accomplished without consent is Pennsylvania's sexual assault statute.<sup>505</sup> The Pennsylvania sexual assault statute states "a person commits a felony of the second-degree when that person engages in sexual intercourse or deviate sexual intercourse with a complainant without the complainant's consent."<sup>506</sup> The Pennsylvania legislature passed this statute after the Pennsylvania Supreme Court overturned a nonviolent rape conviction.<sup>507</sup> In *Commonwealth v. Berkowitz*,<sup>508</sup> the

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<sup>503</sup> See *infra* app.

<sup>504</sup> N.Y. PENAL § 130.25(3) (2002) (New York added this provision in 2000); 18 PA. CONS. STAT. § 3124.1 (2002) (Pennsylvania added this provision in 1995).

<sup>505</sup> 18 PA. CONS. STAT. § 3124.1.

<sup>506</sup> *Id.*

<sup>507</sup> Rosemary J. Scalo, Note: *What Does "No" Mean In Pennsylvania? - The Pennsylvania Supreme Court's Interpretation Of Rape And The Effectiveness Of The Legislature's Response Commonwealth v. Berkowitz*. 40 VILL. L. REV. 193 (1995).

victim clearly and repeatedly communicated her lack of consent.<sup>509</sup> Despite the victim's protests, Berkowitz locked the door to the apartment they were in, pushed her on the bed removed her underwear and penetrated her. The Pennsylvania Supreme Court ruled that state statute did not contain a consent element and that the analysis focuses on the force used by the accused.<sup>510</sup> The Supreme Court then held the amount of force used by Berkowitz did not rise to the level of rape.<sup>511</sup>

Wisconsin's third degree sexual assault prohibits "sexual intercourse with a person without the consent of that person."<sup>512</sup> Wisconsin defines consent as "words or overt actions by a person competent to give informed consent indicating a freely given agreement to have intercourse."<sup>513</sup> Wisconsin's classifies third-degree sexual assault as a Class D felony authorizing a maximum punishment of twenty-five years confinement.<sup>514</sup>

The Pennsylvania statute prohibits intercourse without consent but does not define consent or without consent. Therefore, the extent of the prohibition is unclear. The statute could mean a number of different things. The statute may require that the victim to say no.

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<sup>508</sup> 641 A.2d 1161, 1164 (Pa. 1994)

<sup>509</sup> *Id.* at 1164.

<sup>510</sup> *Id.*

<sup>511</sup> *Id.* at 1166.

<sup>512</sup> WIS. STAT. § 940.225(3) (2001).

<sup>513</sup> *Id.* § 940.225(4).

<sup>514</sup> *Id.* § 939.50.

The statute may require an accused to obtain affirmative consent before engaging in intercourse, or it could mean something else entirely. Wisconsin clearly defines consent and then prohibits intercourse without consent. The Wisconsin approach is superior because it provides a clear definition of the prohibited conduct.

The proposed UCMJ article defines consent,<sup>515</sup> and prohibits intercourse without consent similar to the Wisconsin statute. This provision overturns the statement in *United States v. Tomlinson*,<sup>516</sup> that a victim can honestly believe that she was raped when as a matter of law she had not because she failed to make her lack of consent reasonably manifest. The prohibition of intercourse without consent in the proposed article also prohibits sexual assaults similar to the *Bonano-Torres* and *Webster* cases. In both cases the court struggled with the application of Article 120 in its present form. In *Bonano-Torres* the court overturned the conviction and in *Webster* the court upheld the conviction. The proposed UCMJ article eliminates the confusion and clearly prohibits intercourse without consent. The proposed UCMJ article is:

Any person subject to this chapter under circumstance not constituting criminal sexual misconduct in the first or second degrees, who engages in sexual intercourse with another without the consent of that person, is guilty of criminal sexual misconduct in the third-degree.

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<sup>515</sup> See *supra* section VIB.

<sup>516</sup> 20 M.J. 897, 902 (A.C.M.R. 1985).

## VIII. Maximum Punishments

The division of sexual misconduct into three degrees allows different maximum punishments based on the severity of the offense. Sexual misconduct in the first-degree authorizes a maximum punishment of life imprisonment without the possibility of parole, the highest maximum punishment under the proposed article. The proposed UCMJ article eliminates the death penalty as a possible punishment for rape. In *United States v. Coker*,<sup>517</sup> the Supreme Court ruled that the death penalty is not a constitutionally authorized punishment for rape of an adult woman because the death penalty violates the Eighth Amendment to the United States Constitution prohibition against cruel and unusual punishment. The decision in *Coker* effectively invalidated the death penalty authorization in Article 120(a) in the cases of rape involving adult victims.

The Supreme Court has not ruled on the constitutionality of the death penalty as it applies to the rape of children. At least one state believes the death penalty is appropriate and constitutional for the rape of child younger than twelve. In 1995, Louisiana amended its Aggravated rape statute. The amended statute allows the district attorney the discretion to seek the death penalty for cases involving the rape of a child under the age of twelve.<sup>518</sup>

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<sup>517</sup> 433 U.S. 584 (1977).

<sup>518</sup> LA. REV. STAT. ANN. § 42D (2002).

Before Louisiana amended its aggravated rape statute no state authorized the death penalty for rape.<sup>519</sup> The federal system does not authorize the death penalty for rape. The federal aggravated sexual abuse statute authorizes a maximum possible punishment of life imprisonment.<sup>520</sup> While the UCMJ retains the death penalty as a potential punishment for rape, the last execution for any offense took place over forty years ago.<sup>521</sup> The proposed UCMJ article eliminates the death penalty for rape cases in order to confirm to federal law and to recognize that the military rarely, if ever, enforces capital punishment.

Sexual misconduct in the second-degree authorizes a maximum punishment of twenty years confinement. The twenty-year maximum punishment recognizes the serious nature of the offense and also recognizes that a second-degree offense does not justify the possibility of life imprisonment. Sexual misconduct in the third-degree authorizes a maximum punishment of ten years confinement. The ten-year maximum punishment recognizes the serious nature of the offense, but also recognizes that sexual misconduct in the third-degree is the lowest level of sexual misconduct. Sexual misconduct in the third-degree applies only to the least aggravated case of sexual misconduct. The proposed language of the maximum possible punishment for sexual misconduct is:

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<sup>519</sup> Yale Glazer, *Child Rapist Beware! The Death Penalty and Louisiana's Amended Aggravated Rape Statute*, 25 AM. J. CRIM. L. 79, 80, (1997).

<sup>520</sup> 18 U.S.C. § 2241 (2000).

<sup>521</sup> The last military execution occurred on April 13, 1961. The military executed Private John Bennett for rape and attempted murder. Death Penalty Information Center, U.S. Military, *available at* <http://www.deathpenaltyinfo.org/military.html>, (last visited Apr. 5, 2003).

*Maximum punishment.* (Criminal sexual misconduct in the first-degree)  
Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

*Maximum punishment.* (Criminal sexual misconduct in the second-degree)  
Dishonorable discharge, forfeiture of all pay and allowances, and confinement for twenty years.

*Maximum punishment.* (Criminal sexual misconduct in the third-degree)  
Dishonorable discharge, forfeiture of all pay and allowances, and confinement for ten years.<sup>522</sup>

## IX. Conclusion

Article 120, is an outdated statute in need of modification. The *Webster* and *Simpson* cases illustrate some of the crucial problems with Article 120. The article fails to clearly define crucial terms, fails to clearly define prohibited conduct, and fails to differentiate between degrees of rape based on the presence or absence of aggravating factors. Military members subject to the UCMJ deserve clear rules establishing prohibited conduct. The revision proposed in this thesis improves the precision of the law by making clear statements about which behaviors are considered wrong and criminal. The proposed revision also provides additional protections to the potential victims of sexual abuse.

The proposed revision to the UCMJ and the MCM specifically lists prohibited sexual conduct and eliminates the doctrine of constructive force. The analysis of constructive force

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<sup>522</sup> See *infra* app.

creates great confusion because of the lack of clear standards. The proposed UCMJ article transforms the law from a complex analysis of the totality of the circumstances to a clear statement of prohibited acts. For example, the proposed change transforms the analysis of intercourse between parents and children. The current standard requires a determination of whether the moral, psychological or intellectual force a parent exercises over a child rises to the level of constructive force, becomes a strict prohibition. The only determination required is whether the parent engaged in intercourse with the child. The proposed article makes similar changes in the areas of abuse of positions of authority. The analysis no longer relies on constructive force. Instead, intercourse is strictly prohibited if a position of authority exists. These strict prohibitions provide enhanced protections to children and victims vulnerable to abuse by individuals in positions of authority.

The court in *Webster* and the Cox Commission Report both recommend replacing Article 120 with a comprehensive article that divides the offense of rape into degrees. The revision proposed in this thesis divides the offense of criminal sexual misconduct into degrees based on the presence or absence of aggravating factors. The division of sexual misconduct into degrees provides protection to service members by eliminating the death penalty and decreasing maximum possible punishments for lower level offenses. Currently, the UCMJ lumps all cases of nonconsensual intercourse together. The proposed article creates three degrees of sexual misconduct. The maximum possible punishment decreases in accordance with the magnitude of the criminal sexual misconduct.



The proposed revision to the UCMJ and the MCM promotes good order and discipline and enhances the military justice system for service members. The proposed revision provides clarity to the law of rape where currently there is confusion.

## Appendix

# APPENDIX

§ 920. Art. 120. Criminal Sexual Misconduct.

(a) Any person subject to this chapter who commits an act of sexual intercourse commits the offense of criminal sexual misconduct in the first-degree and shall be punished by life imprisonment without the possibility of parole or such other punishments as a court-martial may direct if any of the following circumstances exists:

(1) the accused displays a dangerous weapon, or an object that the accused uses in a manner to cause the victim to believe it is a dangerous weapon, or if the accused represents that he or she is armed with a dangerous weapon;

(2) the accused causes serious bodily injury or great mental anguish to the victim, or another;

(3) the accused is aided or abetted by one or more persons;

(4) the accused knows or should have known that he or she is infected with the AIDS virus or is HIV positive;

(5) the accused renders the victim unconscious, or conspires with another person to render the victim unconscious prior to having intercourse with the victim;

(6) prior to intercourse the accused or a co-conspirator administers to the victim, by force or threat, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of the victim to appraise or control his or her conduct;

(7) the act of intercourse is with a child under the age of fourteen;

(8) the act of intercourse is with a child under the age of eighteen and the accused is the child's natural parent, stepparent, adopted parent or legal guardian.

(b) Any person subject to this chapter who commits an act of sexual intercourse commits the offense of criminal sexual misconduct in the second-degree and shall be punished by not more than twenty years imprisonment or such other punishments as a court-martial may direct if any of the following circumstances exists:

(1) the use of force;

(2) the use of coercion;

(3) the victim is incapacitated at the time of the intercourse;

(4) the accused is in a position of authority over the victim;

(5) the act of intercourse is with a child older than thirteen but younger than seventeen and the accused is at least four years older than the victim;

(6) the victim is mentally handicapped.

(c) Any person subject to this chapter who commits an act of sexual intercourse commits the offense of criminal sexual misconduct in the third-degree and shall be punished by not more than ten years imprisonment or such other punishments as a court-martial may direct if any of the following circumstances exists:

(1) the victim is older than fifteen but less than eighteen years old and the accused is at least four years older than the victim;

(2) the victim does not consent.

### MCM Definitions

*Force.* (1) The use, possession, display or threaten use of a dangerous weapon; (2) the use of physical force, strength or violence that overcomes the victim; (3) the use of threats of force or violence directed at the victim or another, that compel submission of the victim, threats can be present threats or future threats.

*Consent.* Words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats or coercion by the accused shall not constitute consent. A current or previous dating relationship shall not be sufficient to constitute consent where consent is at issue. Consent is not an issue when the victim is incapable of consent because he or she is under eighteen years of age, physically helpless, or incapable of appraising his or her conduct because he or she is asleep, unconscious, mentally impaired or under the influence of an intoxicant.

*Coercion.* Words or circumstances that cause the victim reasonably to fear that the accused will kill, cause serious injury to, kidnap or take adverse actions against the victim or another which coercion causes the victim to submit to sexual intercourse.

*Dangerous weapon.* Any firearm, whether loaded or not, and whether operable or not, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.

*Serious bodily injury.* Does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries.

*Great Mental Anguish.* Psychological or emotional damage that requires psychiatric or psychological treatment or care, either on an inpatient or outpatient basis, and is characterized by extreme behavioral change or severe physical symptoms

*Legal guardian.* An individual who has the legal authority and duty to care for another because of the other's infancy, incapacity or disability.

*Position of authority.* A position of authority includes, but is not limited to the following relationships: drill sergeants and trainees, recruiters and recruits, seniors and subordinates in the same chain of command, between service academy personnel and service academy students, cadre and students and others in similar positions of dominance and control.

*Mentally handicapped.* An individual is capable to consent to an act of sexual intercourse unless his or her mental infirmity is so severe that he or she is incapable of understanding the act, its motive, and its possible consequences.

*Incapacity.* For purposes of this offense mentally incapacitated means a victim who, due to the influence of a drug, narcotic or intoxicating substance, or due to any act committed upon the victim without the victim's consent or awareness, is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of intercourse.

*Maximum punishment.* (Criminal Sexual Misconduct in the First Degree) Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

*Maximum punishment.* (Criminal Sexual Misconduct in the Second Degree) Dishonorable discharge, forfeiture of all pay and allowances, and confinement for twenty years.

*Maximum punishment.* (Criminal Sexual Misconduct in the Third Degree) Dishonorable discharge, forfeiture of all pay and allowances, and confinement for ten years.